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In The

Supreme Court of the United States

LAWRENCE T. CALLANAN,

Petitioner,

v.

AL LUEBBERS, Superintendent,
Potosi Correctional Center,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner was deprived of due process of law when the prosecution encouraged its key witness to withhold information that a person other than the defendant fled the scene of the crime, allowed that witness to testify falsely that defendant was the only person she saw leaving the scene of the crime, and thereafter argued to the jury that said witness had no reason to lie and that, based on her testimony, it was impossible for someone other than Petitioner to have committed the crime and not be seen?

2. Where a defendant claims that his trial attorney rested the defense case without giving him a chance to testify, and trial counsel claims that he advised him not to testify, but admits that defendant never wavered in his desire to testify, can a silent record support a finding that the defendant knowingly, voluntarily and intelligently waived his right to testify?

3. Whether a state court's denial of a prisoner's constitutional claims based on a non-existent procedural default constitutes an "adjudication on the merits" within the meaning of 28 U.S.C. § 2254(d)?

4. Whether the summary denial of a certificate of appealability is appropriate where reasonable minds could differ as to the factual issues and legal standards controlling the resolution of the constitutional claims underlying Questions 1, 2 and 3 above?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AT ISSUE	2
STATUTORY PROVISIONS AT ISSUE	2
COURT RULES AT ISSUE	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT OF CERTIORARI	10
ISSUE 1 – PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN THE PROSECUTION ENCOURAGED ITS KEY WITNESS TO WITHHOLD INFORMATION THAT UNDERMINED THE STATE'S CIRCUMSTANTIAL EVIDENCE CASE, ELICITED FALSE TESTIMONY FROM THE WITNESS, AND ARGUED TO THE JURY THAT SAID WITNESS HAD NO REASON TO LIE AND THAT, BASED ON HER TESTIMONY, IT WAS IMPOSSIBLE FOR SOMEONE OTHER THAN PETITIONER TO HAVE COMMITTED THE CRIME	10
A. The trial prosecutor admitted the core elements of a due process violation under *Brady v. Maryland* and *Napue v. Illinois*	10
B. The materiality ruling of the courts below is erroneous	14

TABLE OF CONTENTS – Continued

Page

1. The district court's factual analysis is not supported by the record 15

2. The district court applied an erroneous legal standard to deny Petitioner's claim..... 17

ISSUE 2 – WHERE TRIAL COUNSEL RESTS THE DEFENSE CASE WITHOUT ALLOWING HIS CLIENT TO TESTIFY, AND WHERE DEFENDANT NEVER WAVERED IN HIS DESIRE TO TESTIFY, CAN A SILENT RECORD SUPPORT A FINDING THAT THE DEFENDANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO TESTIFY IN HIS DEFENSE? 20

ISSUE 3 – 28 U.S.C. § 2254(d) SHOULD NOT BE CONSTRUED TO REQUIRE DEFERENCE TO A STATE COURT JUDGMENT WHICH RESTS UPON AN ARBITRARY, UNWARRANTED AVOIDANCE OF PETITIONER'S CONSTITUTIONAL CLAIMS..... 22

A. The state court's avoidance of Mr. Callanan's constitutional claims..... 23

1. The ineffective assistance of counsel claim... 23

2. The prosecutorial misconduct claims 25

B. A claim avoided on procedural grounds is not "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) 26

TABLE OF CONTENTS – Continued

Page

ISSUE 4 – IS THE SUMMARY DENIAL OF A CERTIFICATE OF APPEALABILITY APPROPRIATE WHERE REASONABLE MINDS COULD DIFFER AS TO THE FACTUAL ISSUES AND LEGAL STANDARDS CONTROLLING THE RESOLUTION OF CLAIMS PRESENTED IN QUESTIONS 1, 2 AND 3 ABOVE? 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937) 21

Anderson v. Goeke, 44 F.3d 675 (8th Cir. 1995) 9, 14

Banks v. Dretke, 540 U.S. 668 (2004) 16, 18, 19, 30

Boykin v. Alabama, 395 U.S. 238 (1969) 21

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Braun v. Powell, 227 F.3d 908 (7th Cir. 2000) 26

Clinkscale v. Carter, 375 F.3d 430 (6th Cir. 2004) 26

DeBerry v. Portuondo, 403 F.3d 57 (2nd Cir. 2005) 26

Giglio v. United States, 405 U.S. 150 (1972) 18

Gonzales v. McKune, 247 F.3d 1066 (10th Cir. 2001) 26

Harris v. Reed, 489 U.S. 255 (1989) 24

Hohn v. United States, 524 U.S. 236 (1998) 28

Hudson v. Hunt, 235 F.3d 892 (4th Cir. 2000) 26

Johnson v. Zerbst, 304 U.S. 458 (1938) 21

Keeney v. Tomayo-Reyes, 504 U.S. 1 (1992) 16

Kyles v. Whitley, 514 U.S. 419 (1995) 18, 19

Lonchar v. Thomas, 517 U.S. 314 (1996) 27, 28

Lozada v. Deeds, 498 U.S. 430 (1991) (per curiam) 28

Lynce v. Mathis, 519 U.S. 433 (1997) 28

Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997) 27

Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999) 26

Miller-El v. Cockrell, 537 U.S. 322 (2003) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Miranda v. Bennett, 322 F.3d 171 (2nd Cir. 2003) 26

Napue v. Illinois, 360 U.S. 264 (1959) 9, 15, 17, 18

Netherland v. Tuggle, 515 U.S. 951 (1995) (per curiam) 15

North Carolina v. Alford, 400 U.S. 25 (1970) 21

People v. Savvides, 136 N.E.2d 853 (1956) 18

Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002) 26

Porter v. Lockhart, 925 F.2d 1107 (8th Cir. 1991) 21

Salinger v. Loisel, 265 U.S. 224 (1924) 28

Schone v. Purkett, 15 F.3d 785 (8th Cir. 1994) 21

Slack v. McDaniel, 529 U.S. 473 (2000) 29

Stacey v. Solem, 801 F.2d 1048 (8th Cir. 1986) 21

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 27

Strickler v. Greene, 527 U.S. 263 (1999) 16

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) 26

Tennard v. Dretke, 124 S. Ct. 2562 (2004) 27, 28, 30

Townsend v. Sain, 372 U.S. 293 (1963) 16

United States v. Agurs, 427 U.S. 97 (1976) 18

United States v. Bagley, 473 U.S. 667 (1985) 17

Walker v. Gibson, 228 F.3d 1217 (10th Cir. 2000) 26

Whitfield v. Bowersox, 324 F.3d 1009 (8th Cir. 2003) 21

Young v. Lockhart, 892 F.2d 1348 (8th Cir. 1989) 21

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 9, cl. 2 2

U.S. Const. amend. VI 2

U.S. Const. amend. XIV 2

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2253 ..... 2, 3, 9, 29

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d) 7, 24

28 U.S.C. § 2254(d)(2) 3

FEDERAL RULES

F.R.A.P. 22 3

F.R.A.P. 22(b)(1) 3, 9, 30

Sup. Ct. R. 10 28

STATE STATUTES

Mo. Rev. Stat. § 491.074 (2004) 17

STATE RULES

Mo. Sup. Ct. R. 29.15 ..... 4, 7, 19, 24

PETITION FOR WRIT OF CERTIORARI

Petitioner Lawrence T. Callanan asks that this Court issue a Writ of Certiorari to review the order and judgment of the United States Court of Appeals for the Eighth Circuit denying habeas corpus relief without issuing a certificate of appealability or explaining its reasons for denying the same.

OPINIONS BELOW

The order of the Court of Appeals summarily denying Mr. Callanan's request for a Certificate of Appealability (COA) is unpublished. The order is set out in the Appendix. (App. 1.) The unpublished Memorandum and Opinion of the district court denying habeas corpus relief, *Callanan v. Luebbers,* E.D. Mo. 4:01CV326-DJS, is included at App. 2. The Magistrate's Report and Recommendation of October 23, 2003, is found at App. 27.

JURISDICTION

On October 14, 2004, the Court of Appeals denied Petitioner's application for a certificate of appealability to review the judgment of the district court denying Mr. Callanan's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The Court of Appeals denied his timely filed petitions for panel and en banc rehearing on December 13, 2004. (App. 78.) The Honorable Clarence Thomas, Circuit Justice for the Eighth Circuit, extended the time within which to file a petition for writ of certiorari to May 12, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Constitution:

ARTICLE I, § 9, cl. 2

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

AMEND. VI

> In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defense.

AMEND. XIV

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Code:

28 U.S.C. § 2253

> (a) In a habeas proceeding or a proceeding under section 2255 before a district judge, a final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant or to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254(d)(2)

An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

COURT RULES AT ISSUE

The questions presented implicate the following Federal Rule of Appellate Procedure:

Rule 22. Habeas Corpus and Section 2255 proceedings.

* * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal

> unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

STATEMENT OF THE CASE

Larry Callanan was found guilty by a jury and sentenced to life without the possibility of parole in the shooting death of Johnny Schuh. The trial defense attorney, Paul D'Agrosa, observed that "the guilty verdict was a surprise to everyone involved" in the case, including the prosecutor. (Transcript of Post-Conviction Hearing on Rule 29.15 motion at 40, hereinafter cited PCR Tr. ___.) The trial prosecutor, Dan Diemer, admitted:

> I was concerned about the purely circumstantial evidence in the case. . . . no one was more surprised than I was when the jury came back after an hour and a half with a conviction of first degree murder. . . . I had prepared Johnny Schuh's family to expect a verdict of acquittal or second degree murder.

(App. 81.)

The state's case depended entirely on inferences drawn from the testimony of Kara Weinstein, who accompanied Larry Callanan, Leo McLaughlin and Lisa Schaefer to several parties and Fourth of July celebrations on the evening of July 1, 1995. They met around 7:00 p.m. at the home of Tom Lassen on a cul-de-sac called Bent Twig Lane (Trial Transcript, hereinafter T. 255-56, 282), then drove in the same car to the St. Louis Arch to watch a fireworks display. (T. 257-58.) Around 10:30 p.m., they went to a party at a place called the Columbia Bottoms, where they encountered Johnny Schuh. Although they were drinking vodka and beer the entire evening (T. 257, 259, 263-65, 391, 443), Kara Weinstein denied that she was intoxicated. (T. 311, 320.)

Ms. Weinstein claimed that Mr. Callanan and Schuh argued or engaged in horseplay at the Columbia Bottoms party. (T. 268.) State's witness Chris Boelhauf testified that the two had a heated argument in which they "[shook] their fingers in each others' face." (T. 447.) Around 2:00 or 2:30 a.m., Petitioner, Ms. Weinstein, McLaughlin and Schuh left the party together to go to Tom Lassen's house. (T. 266, 268.)

Ms. Weinstein said she dropped them off and drove away (T. 251), but after she was over a block away (T. 302-03), she heard something that sounded like gunfire, so she drove back toward Bent Twig. (T. 382, 427, 570.) Ms. Weinstein claims that as she drove past Bent Twig, she saw Mr. Callanan walk across the street from Lassen's house and get in his pickup truck, driving away with the headlights off. (T. 252-53, 272.) She then drove down the cul-de-sac and observed a crowd in Lassen's front yard. She stopped and saw Johnny Schuh lying on the ground. (T. 254-55.) Although she did not see the shooting, she testified that Mr. Callanan's truck was the only vehicle she had seen driving away from Lassen's house in that time

frame. (T. 252, 282, 289.) The prosecution relied on this testimony to argue that no one other than Mr. Callanan could have committed the crime (T. 657, 659, 660, 663), telling the jury that no one else could have committed the crime "and not be seen." (*Id.* at. 659.)

In his state proceedings challenging his conviction and in his federal habeas corpus petition, Mr. Callanan presented several constitutional claims relating to the credibility of Ms. Weinstein.[1] He challenged trial counsel's effectiveness, including his failure to call witnesses who would have testified that Ms. Weinstein was extremely intoxicated that evening and that she was romantically involved with Johnny Schuh's half-brother. Mr. Callanan also raised several claims of prosecutorial misconduct which included misleading the jury with unfounded and unproven allegations of criminal activity by relatives of Mr. Callanan who testified in his defense, the failure to disclose the criminal convictions of state's witness Chris Boelhauf, and other improper arguments and conduct.

The Missouri courts denied Mr. Callanan's request for a hearing and motion for post-conviction relief because he allegedly failed to comply with certain technical procedural requirements and, further, denied his claims of prosecutorial misconduct because they were allegedly not supported by the record. The Magistrate found that Missouri's avoidance of Mr. Callanan's constitutional claims was unwarranted, stating that she could "discern[] no pleading deficiency in plaintiff's presentation of his

[1] Two of Mr. Callanan's claims were denied on the merits after an evidentiary hearing in state court, his claim that his lawyer was ineffective for failing to challenge a juror who admitted she was biased in favor of the state, and his claim that his lawyer was ineffective for failing to respect Mr. Callanan's decision to testify in his own defense.

Strickland claims in the motion for post-conviction relief." (App. 56.) Further, the Magistrate was "troubled" by the superficial review Mr. Callanan's case received in the state courts, including the state court's refusal to conduct a hearing on well-pled claims. (App. 55-56.) On Mr. Callanan's allegations of prosecutorial misconduct, the Magistrate stated that she "takes issue with the state motion court's finding that there was no support in the record" for Mr. Callanan's claims. (App. 71.) Although she denied all of Mr. Callanan's claims on the merits, the Magistrate conceded that constitutional error could well have affected the outcome of the case, finding, "[i]t is not clear to the Court that there is no reasonable probability that the result of the trial would have been different had all the evidence petitioner claims was available to call into question Ms. Weinstein's credibility been presented to the jury." (App. 56-57.) The Magistrate *sua sponte* recommended the issuance of a Certificate of Appealability (COA) on Mr. Callanan's claims of ineffective assistance of counsel. (App. 75.)

The district court agreed with the Magistrate's analysis of the procedural status of Petitioner's claims, finding that "petitioner met all of the procedural rules required in filing his 29.15 motion." (App. 7.) However, the Court then inexplicably "construe[d] petitioner's Rule 29.15 motion to have been denied on the merits rather than on independent and adequate state procedural grounds" (App. 7-8) and concluded that the claims which the state courts had avoided on invalid procedural grounds "were adjudicated in state court proceedings" within the meaning of 28 U.S.C. § 2254(d). (App. 10.) The district court concluded, "[t]herefore, petitioner's ten claims which were denied in state court proceedings will be reviewed under the objectively unreasonable standard" of the AEDPA. (App. 11.) The district court denied all ten claims under the deferential standard of review, including the claims which the

state court wrongly refused to adjudicate on the merits. (App. 16, 18, 22.) Mr. Callanan's eleventh claim, that the prosecutor withheld exculpatory evidence and presented false testimony, was discovered while Mr. Callanan's habeas petition was pending in the district court. The prosecutor admitted, "[w]hen I interviewed [Ms. Weinstein] she mentioned something about seeing another car leave the scene of the crime around the same time she saw Larry Callanan leave the scene in his truck." (App. 80.) However, he discouraged her from disclosing that fact to defense counsel or the jury. He explained his rationale for doing so:

> My case depended heavily on the element of time, distance and speed to demonstrate Larry Callanan's presence at the scene of the crime and exclusive opportunity to have been the shooter. I was concerned that the presence of the second vehicle in that time frame would raise the inference that another person was also present and had equal opportunity to commit the crime. That is why I had asked Ms. Weinstein not to volunteer that information prior to the grand jury proceeding. She also did not volunteer that information to Mr. D'Agrosa, nor did she do so at the time of trial.

(App. 80.) In spite of his personal knowledge to the contrary, the prosecutor told the jury in opening statement that Kara "saw no other car" and that "she saw no one else" leave the scene of the crime (T. 231), elicited that testimony from her during the trial (T. 252, 282, 289), and argued to the jury that Petitioner was guilty because he was the only person who left the scene at the time of the murder. (T. 657-58, 659, 660, 663.) No one else could have shot Schuh "and not be seen." (T. 659.) In response to defense counsel's argument that neighbors had seen a second car fleeing the scene, the prosecutor argued "the

physical impossibility" that someone else could have been present to commit the crime. (T. 709.)

The Magistrate found that Mr. Callanan had not "failed to develop" his *Brady* and *Napue* claims because he reasonably relied on the representation of the prosecutor to the trial court and counsel that all *Brady* material had been disclosed. (App. 83.) (T. 18.) Therefore, she concluded that this claim "is not barred by the statute of limitations or by procedural default." (App. 68.) Although the Magistrate condemned the prosecutor's conduct (*id.*), she could "discern[] no significant prejudice to petitioner from not knowing that Ms. Weinstein told the prosecutor she saw a second car." (App. 69.) The district court denied relief on this claim because "petitioner has failed to show 'that absent the alleged impropriety the verdict probably would have been different.'" (App. 22) *quoting*, *Anderson v. Goeke*, 44 F.3d 675, 679 (8th Cir. 1995).

Pursuant to 28 U.S.C. § 2253 and F.R.A.P. 22(b)(1), Mr. Callanan moved in the district court for a certificate of appealability. Although the Magistrate recommended the issuance of a COA on Mr. Callanan's claims of ineffective assistance of counsel (App. 75), the district court summarily denied a COA. Mr. Callanan renewed his motion for a COA in the Court of Appeals, which also denied his request without explanation. Mr. Callanan's applications for rehearing and rehearing en banc were denied on December 13, 2004, again without explanation.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

ISSUE 1

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHEN THE PROSECUTION ENCOURAGED ITS KEY WITNESS TO WITHHOLD INFORMATION THAT UNDERMINED THE STATE'S CIRCUMSTANTIAL EVIDENCE CASE, ELICITED FALSE TESTIMONY FROM THE WITNESS, AND ARGUED TO THE JURY THAT SAID WITNESS HAD NO REASON TO LIE AND THAT, BASED ON HER TESTIMONY, IT WAS IMPOSSIBLE FOR SOMEONE OTHER THAN PETITIONER TO HAVE COMMITTED THE CRIME.

A. The trial prosecutor admitted the core elements of a due process violation under *Brady v. Maryland* and *Napue v. Illinois*

In the wee hours of July 2, 1995, gunshots were heard in the vicinity of Tom Lassen's suburban St. Louis, Missouri, home. Kara Weinstein claimed that moments later, she saw Petitioner, Larry Callanan, get in his truck and drive away from Lassen's house, with the headlights off. Lassen and several party guests, alarmed by the shots, ran to his door to find Johnny Schuh dying from several gunshot wounds. None saw Larry Callanan; Weinstein was the only witness to put him at the scene. In addition, the state presented no physical evidence to connect Mr. Callanan to the crime.

At Petitioner's trial for the murder of Johnny Schuh, the prosecutor in his opening statement told the jury that Ms. Weinstein's testimony would establish that Mr. Callanan was the only person who could have fired the fatal shots:

> She'll tell you, ladies and gentlemen, that when she saw the defendant cross from the front of the Lassen house to get into his car, she saw no one

> else. She'll tell you, ladies and gentlemen, that when she drove back to the scene, *she saw no other car leave, and she saw no one else running away from that residence.*

(T. 231) (emphasis added). The issue in this case arises from the prosecutor's sworn admission, years later, that he knew this testimony to be false. (App. 79-81.)

Ms. Weinstein was the state's first witness. She was repeatedly asked by the prosecution whether she had seen anyone other than Mr. Callanan walk or drive away from the Lassen house after she heard the shots, and she repeatedly testified that she had not. (T. 231, 252, 282-89.)[2] The defense attorney also directly asked Ms. Weinstein if she had see anyone else driving off, and she insisted that she had not. (T. 310.)[3] The prosecutor repeatedly vouched for Ms. Weinstein's credibility and relied heavily on her version of events in arguing to the jury:

> She's got no reason to lie (T. 656) . . . Kara Weinstein has no ax to grind in this case. . . . Why would Kara come in here and point-blank lie to you people? She just wouldn't do it. She's not that kind of person (T. 661-62). . . . remember throughout this, what did Kara have to gain in all of her testimony? What did she have at stake? What was her reason to come in here and

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[2] Q. (by Mr. Diemer) Did you ever see anyone when you came back or either coming through any of those yards, coming through the Lassen's yard or any cars at all coming in any direction when you saw the defendant going back to his truck?

A. (Ms. Weinstein) No.

(T. 282.)

[3] Q. (by Mr. D'Agrosa) Did you see anybody drive off from the scene other than as you said, Larry Callanan? Did you see anybody else?

A. (Ms. Weinstein) I don't think – no.

(T. 310.)

> fabricate a story, and for gosh sakes, if she was going to build a story, put a case on this guy – (T. 671). . . . She's the one here trying to be a good citizen, trying to stand up, and has she varied in her version from what the events were that night?. . . . She has been rock solid truthful about the actions of that man [petitioner] which draw the conclusion that it was he and no one else that shot Johnny Schuh . . . . (T. 672.)

The defense argued that Mr. Callanan is innocent, and focused on the entirely circumstantial nature of the state's evidence. In addition, defense counsel called neighbors awakened by the shots who testified for the defense that they heard a car racing away from the scene; some observed a dark, late-model Camaro or Firebird speeding away shortly after the shots were fired. (T. 673-703.)

In response, the prosecutor made the second half of his argument all about Kara Weinstein; he made her the protagonist of the state's theory. The repeated theme was that "she came back to the truth." (T. 706.) He told the jury "She's always stayed with the truth. What she told you, that has always been the truth." (T. 707.) Diemer told the jury that Weinstein's version of events has always been consistent, and that she had no reason to lie. (T. 708.) He attacked the testimony of Lassen's neighbors, suggesting that, due to the passage of time, they could not accurately remember the time lapse between the shots and the speeding Camaro. (T. 662-63.) Diemer argued that because of Ms. Weinstein's truthful, consistent testimony, it was a "physical impossibility that somebody else was there." (T. 708.)

During federal habeas proceedings, Mr. Diemer disclosed the substance of his pretrial discussions with Ms. Weinstein, admitted that she advised him she had seen a second car, and confessed he had discouraged her from disclosing that fact to defense counsel or to the jury. He submitted a sworn written statement to the district court:

> Our case against Larry was entirely circumstantial and depended very heavily on the testimony of Kara Weinstein. My impression of Ms. Weinstein was that she was immature and somewhat flighty.
>
> I remember preparing Ms. Weinstein to testify prior to the grand jury proceedings in this case. When I interviewed her, she mentioned something about seeing another car leave the scene of the crime *around the same time she saw Larry Callanan leave in his truck.* In my mind, I thought the car she described could have belonged to Ronnie Claggett. Although I did not tell Ms. Weinstein to lie or withhold information, I told her simply to answer the questions that were asked, and not to volunteer any information about the second car unless she was specifically asked to do so.
>
> * * *
>
> My case depended heavily on the element of time, distance and speed to demonstrate Larry Callanan's presence at the scene of the crime and exclusive opportunity to have been the shooter. *I was concerned that the presence of the second vehicle in that time frame would raise the inference that another person was also present and had equal opportunity to commit the crime. That is why I had asked Ms. Weinstein not to volunteer that information* prior to the grand jury proceeding. She also did not volunteer that information to Mr. D'Agrosa, nor did she do so at the time of trial.

(App. 80) (emphasis added). Of course, the trial record conclusively reflects that Ms. Weinstein was asked about the second car by both Mr. Diemer (T. 282) and Mr. D'Agrosa (T. 310), she gave false testimony in response without correction from Mr. Diemer, and Mr. Diemer relied heavily on that false testimony to attack the defense case.

Promptly upon learning that Ms. Weinstein told the prosecutor she had seen the second car, Mr. Callanan moved for leave to amend his habeas petition to include a new claim, Claim 11, that Mr. Callanan's right under the Due Process Clause of the Fourteenth Amendment "was violated when the prosecutor withheld material exculpatory evidence that [Ms. Weinstein] had seen a second car leave the scene of the crime, and when the prosecutor took no action when Ms. Weinstein testified falsely on this issue before the jury." *Callanan v. Luebbers*, E.D.Mo. 4:01CV326-DJS, Petitioner's Claim 11 (June 27, 2002). He tendered Mr. Diemer's affidavit in support of his claim. (App. 79-81.)

B. The materiality ruling of the courts below is erroneous

The Magistrate condemned the prosecutor's conduct (App. 68-69) and found that Mr. Diemer's deception could not have been discovered by Petitioner's use of due diligence during state court proceedings. (App. 68.) The district court agreed that "other than fortuitous discovery, plaintiff had no means of discovering the basis of claim 11." (App. 8-9.) Because the issue was properly before the court without procedural impediment, the district court reviewed the claim under the pre-AEDPA standard of review. (App. 11.) Nevertheless, the district court denied relief because "petitioner has failed to show 'that absent the alleged impropriety the outcome would have been different.'" (App. 22) (*citing Anderson v. Goeke*, 44 F.3d 675, 679 (8th Cir. 1995)). The district court explained its reasoning:

> Petitioner's argument is undermined however by the fact that the jury did hear evidence at trial that Mr. Claggett left the scene after the shooting. Mr. Claggett testified at trial that he left the Lassen house soon after the shooting. Trial Tr. at

> p. 360-68. In addition, the defense called residents of the Bent Twig Lane community who testified that a car, matching the description of Mr. Claggett's car, had left the scene soon after the shooting. Trial Tr. 572-74. Therefore, even without corroborating evidence from Ms. Weinstein, there was sufficient evidence for the jury to determine that Mr. Claggett had left the scene soon after the shooting.

(App. 22.) Although Mr. Callanan pointed out that the district court's decision on this claim is factually and legally flawed, both the district court and the Court of Appeals denied a Certificate of Appealability. (App. 77, 1.)[4]

1. The district court's factual analysis is not supported by the record

Because the prosecutor's deception went undetected until well after the conclusion of state court proceedings, the district court was obliged to review Mr. Callanan's claim *de novo* under *Brady* and *Napue*. (App. 11, 68.) However, its analysis of the facts underlying the prosecutor's admitted use of false testimony falls short of the plenary review that a court must give to constitutional claims:

> It is the typical, not the rare, case in which constitutional claims turn upon the resolution of

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[4] The failure to issue a COA, and the failure to state reasons that a COA should not issue, make it difficult for this Court to review the constitutional issues presented by the decision below. *See, e.g.*, *Netherland v. Tuggle*, 515 U.S. 951 (1995) (per curiam) (requiring that courts explain their reasoning for granting stays of execution to facilitate this Court's review of the propriety of those decisions). However, this case presents an appropriate context for this Court to examine the practice of the court below with respect to certificates of appealability because of the serious jurisprudential flaws in the district court decision which may escape appellate scrutiny altogether without the intervention of this Court. See Question Three, below.

> contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

Townsend v. Sain, 372 U.S. 293, 312 (1963), *overruled in part, Keeney v. Tomayo-Reyes*, 504 U.S. 1 (1992).

The flaws in the district court's judgment begin with its failure to consider the prosecutor's admission as to why he discouraged Ms. Weinstein from mentioning the other car, as well as the use that he made of her false testimony in closing argument. *Compare Banks v. Dretke*, 540 U.S. 668, 700 (2004), finding prejudice from a *Brady* violation where "[t]he prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony," with *Strickler v. Greene*, 527 U.S. 263, 295 (1999), finding no prejudice where the non-disclosed evidence "was not relied upon by the prosecution at all during its closing argument at the penalty phase." As noted above, the record of trial and closing argument conclusively establishes that the real issue in the case was whether another person – Claggett or anyone else – left the scene *in the same time frame* as Mr. Callanan. Had Ms. Weinstein told the truth, Diemer could not have argued, as he did forcefully, that it was a "physical impossibility that somebody else was there." (T. 708.) As the Magistrate observed, the state's case depended on proving that "[t]here was no evidence that anyone else was present at the precise time and place of the crimes." (App. 64-65.) But

because Ms. Weinstein conspired with the prosecutor to deceive the jury on that specific point, the prosecutor was able to argue that "Ronnie [Claggett] is probably not the guy that did it because the car [i.e. his Camaro] left too late." (T. 664.) Compliance with his duty under *Brady* and *Napue* would have destroyed the state's misleading theory that Mr. Callanan had the *exclusive* opportunity to shoot Johnny Schuh.[5]

2. The district court applied an erroneous legal standard to deny Petitioner's claim

The district court and the Magistrate applied the wrong legal standard for measuring the prejudice Petitioner suffered as a result of the prosecutor's misconduct. Taking note of the rule in *United States v. Bagley*, 473 U.S. 667, 682 (1985), that the suppression of exculpatory evidence will result in a new trial if there is a reasonable likelihood that the result of the proceeding would be different, the Magistrate stated that "the same materiality standard applies to the prohibition of *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), against a prosecutor allowing false testimony to go uncorrected." (Report at 40.) That is not accurate. This Court in *Napue* observed:

> . . . a lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice

[5] Also significant is the impact of a timely disclosure that Ms. Weinstein had lied about the second car. Under Missouri law, defense counsel could have argued the truth of her out-of-court statement and used it to impeach the balance of her testimony. *See* Mo. Rev. Stat. § 491.074 (2004). The jury would have been more likely to reject all of her testimony had it known that she deliberately gave false testimony on a key disputed fact.

> matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

360 U.S. at 269-70 (*citing People v. Savvides*, 136 N.E.2d 853, 854-55 (1956)). *Accord, Giglio v. United States,* 405 U.S. 150 (1972). Contrary to the ruling below, this Court has clearly established a less demanding standard where the prosecutor's misconduct consists of using false testimony. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (*citing United States v. Agurs*, 427 U.S. 97, 103 (1976)) (emphasis added).[6]

Finally, the district court explicitly refused to abide by this Court's instructions in *Kyles*, 514 U.S. at 436, to assess the impact of the prosecutor's misconduct "collectively, not item by item." (App. 19.) ("[P]etitioner seems to argue that the cumulative effect of the prosecutor's misconduct is sufficient to establish a basis for habeas relief. However, it is clear that 'cumulative error' is not a basis for habeas relief.")[7] Thus, the district court failed to consider the cumulative effect of the prosecutor's multiple instances of misconduct, including his knowing reliance on

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[6] The fact that the threshold standard for proving prejudice is lower under *Giglio* than under *Brady* is clear from this Court's observation in *Banks* that "[b]ecause we conclude that Banks qualifies for relief under *Brady*, we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded." *Banks v. Dretke*, 540 U.S. 668, 690, n.11 (2004). If the standards were the same, there would have been no occasion to discuss the pleading issue.

[7] In *Banks v. Dretke*, the Supreme Court granted certiorari to address the issue of whether prejudice caused by ineffective assistance of counsel is assessed by looking at the cumulative affect of counsel's poor performance. 540 U.S. 668, 689 n.10 (2004). The Court did not resolve that issue because Banks was entitled to relief on other grounds. This case presents the question left unresolved by *Banks*.

false testimony, his failure to disclose Chris Boelhauf's prior conviction, and his deliberate attempts to mislead the jury with respect to the criminal history of defense witnesses, as required by *Kyles*.

It is important to note that the district court and Magistrate did not question the fact that the prosecutor's admission of using false evidence was truthful; in fact, the Magistrate found that the prosecutor's conduct "was not to be condoned." (App. 68-69.) Thus, the case turns not on whether the prosecutor knowingly allowed false testimony to go to the jury, but what impact the false testimony could have had on the verdict. In a case where both the defense and prosecuting attorneys agree that the guilty verdict was "a surprise" to everyone involved in the case (App. 81, PCR Tr. 40) and the Magistrate found that "the evidence of guilt in this case cannot be characterized as overwhelming" (App. 56), the misconduct of the prosecutor could certainly have had an adverse effect on the verdict.

Petitioner is in the unenviable position of asking this Court to review on certiorari an order of a Court of Appeals consisting of a one-sentence denial of a certificate of appealability. Mr. Callanan is in a worse position than the Petitioner in the factually similar case of *Banks v. Dretke*, 540 U.S. 668 (2004), who at least had the benefit of an opinion from the Fifth Circuit Court of Appeals denying a COA. Examination of the memorandum and order of the district court in this case reveals sufficient parallels to the *Banks* case that this Court should undertake a similar course of action; the writ of certiorari should be granted to examine the merits of Mr. Callanan's claim of prosecutorial use of false testimony and the propriety of the Eighth Circuit's unexplained denial of a certificate of appealability.

ISSUE 2

WHERE TRIAL COUNSEL RESTS THE DEFENSE CASE WITHOUT ALLOWING HIS CLIENT TO TESTIFY, AND WHERE DEFENDANT NEVER WAVERED IN HIS DESIRE TO TESTIFY, CAN A SILENT RECORD SUPPORT A FINDING THAT THE DEFENDANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO TESTIFY IN HIS DEFENSE?

Mr. Callanan alleged that his defense lawyer rested the defense case without permitting him to testify. Defense counsel conceded that Petitioner made clear his desire to testify, that he never changed his mind about testifying, that this "was his posture up until the time the case was rested" (PCR Tr. 39), and admitted that he only would have respected his client's "vehement wishes" if they were expressed emphatically. (PCR Tr. 71-72.) Counsel also conceded that Petitioner told him "up and *through* the time that the case was rested" that he wanted to testify. (PCR Tr. 45.)

At the time of trial, Petitioner was a teenager with a ninth grade education and little experience with the justice system. When the defense rested, no record was made on whether Mr. Callanan knew he could testify or wished to waive that right. At the post-conviction hearing, trial counsel was vague and evasive. The closest he came to describing a waiver was, "I think ultimately a decision was made that our defense would not involve his testimony" (PCR Tr. 16), though he did not say who made the decision.

The state court's finding that trial counsel was a credible witness does not resolve this issue; counsel did not dispute Mr. Callanan's allegation that he expressed his desire to testify. (PCR Tr. 17-18.) The only conclusion supported by the record is that Petitioner wanted to testify in his defense, that he told counsel of his desire, and that counsel placed the burden on Mr. Callanan to assert his right with utmost force. Counsel would have respected Mr.

Callanan's decision only if he had expressed "his vehement wishes," or if he had "insisted" or "completely insisted" on exercising his right, or "emphatically" insisted on testifying. (PCR Tr. 16, 17, 39, 45, 71-72.) Thus, the dispute is not whether Mr. Callanan asserted his right to testify, but the degree to which he did so. In denying Petitioner's claim, the state courts refused to decide whether Petitioner's alleged waiver of his right to testify was knowing, voluntary and intelligent.

Like the state court, the district court assumed that "by his . . . silence, the defendant apparently acquiesces to the waiver," App. 14, *citing Whitfield v. Bowersox*, 324 F.3d 1009 (8th Cir. 2003). That reasoning is at odds with this Court's long-standing jurisprudence commanding that courts "'indulge every reasonable presumption against waiver' of constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (*citing Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). A waiver of any right is not valid unless it constitutes a "voluntary and intelligent choice among the alternative courses of action." *Schone v. Purkett*, 15 F.3d 785, 788-89 (8th Cir. 1994) (*citing Porter v. Lockhart*, 925 F.2d 1107, 1110 (8th Cir. 1991)) (*quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). The issue of voluntariness of a waiver of constitutional rights is resolved on the "totality of the circumstances" and the "record as a whole." *Stacey v. Solem*, 801 F.2d 1048, 1050-51 (8th Cir. 1986). It is axiomatic that the "background, experience and conduct of the accused" are relevant to the validity of a waiver of constitutional rights. *Johnson v. Zerbst*, 304 U.S. at 464; *Young v. Lockhart*, 892 F.2d 1348, 1351 (8th Cir. 1989). The court "cannot assume a waiver of . . . important federal rights from a silent record." *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

The Magistrate and the state courts failed to apply these clearly established Supreme Court precedents when they treated Mr. Callanan, an eighteen-year-old defendant facing life imprisonment without parole, as though he

were a hardened criminal with substantial experience in the rules governing criminal trials. The record is clear that, at the time of trial, Mr. Callanan had a ninth-grade education, had never been involved in a trial of any kind and was not familiar with the procedures of the court.

As noted in connection with Question One, above, the summary denial of a COA makes this Court's review of this important constitutional issue difficult. This Court should grant certiorari to review this issue as well as the practice of the court below with respect to certificates of appealability. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003).

ISSUE 3

28 U.S.C. § 2254(d) SHOULD NOT BE CONSTRUED TO REQUIRE DEFERENCE TO A STATE COURT JUDGMENT WHICH RESTS UPON AN ARBITRARY, UNWARRANTED AVOIDANCE OF PETITIONER'S CONSTITUTIONAL CLAIMS.

In a murder case that hinged entirely on the testimony of a single witness, Mr. Callanan challenged the performance of defense counsel for failing to interview and present testimony to impeach that witness. He also raised allegations of prosecutorial misconduct for improperly making completely unfounded suggestions that Petitioner's father and cousin who testified in his defense were career criminals with ties to organized crime and for making other improper assertions of personal knowledge and belief that Mr. Callanan is guilty. The Magistrate and the district court found that the state court relied on invalid procedural grounds to avoid adjudication of these issues. However, the district court interpreted the state's denial of relief as a ruling on the merits and denied Mr. Callanan's claims of ineffective assistance of counsel and prosecutorial misconduct under the "objectively unreasonable standard" of the AEDPA. (App. 11, 16, 19.)

A. The state court's avoidance of Mr. Callanan's constitutional claims

1. The ineffective assistance of counsel claim

The case against Mr. Callanan is essentially a one-witness, circumstantial evidence case. Mr. Callanan alleged that his trial counsel was ineffective for failing to investigate and present evidence that would have impeached one witness, Kara Weinstein, by showing that she was heavily intoxicated at the time she allegedly saw Mr. Callanan leaving the scene, that she was romantically involved with the victim's half-brother, Billy Losing,[8] that she had been treated for mental problems, and other evidence tending to cast doubt on her credibility or call into question the circumstances on which the state based its inferences of guilt. Missouri courts refused to review or grant a hearing on Mr. Callanan's claims of ineffective assistance of counsel, alleging that Petitioner had failed to plead that he was prejudiced by the constitutional violations. (App. 7-8.)

The Magistrate judge questioned the state court's rationale for denying Mr. Callanan's claims of ineffective assistance of counsel without a hearing:

> As noted above, the state post-conviction court denied petitioner's request for a hearing on this claim. *This Court is troubled by the apparent basis for this denial* – petitioner's asserted failure to plead and show that but for counsel's alleged errors, the outcome of the trial would have been different.

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[8] In addition to giving Ms. Weinstein incentive to embellish her testimony against Mr. Callanan, evidence of her relationship with Billy Losing increases the probative value of the testimony of a neighbor, Anna Weschke, who was awakened by gunshots, followed by a loud woman's voice shouting Billy's name.

> *The Court discerns no deficiency in plaintiff's presentation of his Strickland claims in the motion for post-conviction relief.* More importantly, the evidence of guilt in this case cannot be characterized as overwhelming. . . . It is not clear to the Court that there is no reasonable probability that the result of the trial would have been different had all the evidence petitioner claims was available to call into question Ms. Weinstein's credibility been presented to the jury.

(App. 56-57) (emphasis added).[9] The district court also found that "petitioner met all of the procedural rules required in filing his 29.15 motion." (App. 7.)

After finding that the state court wrongly avoided adjudication of Mr. Callanan's claims, the district court, apparently confusing the "adjudicated on the merits" language of § 2254(d) with the "plain statement" rule of *Harris v. Reed*, 489 U.S. 255 (1989), nevertheless relied upon the AEDPA deferential standard of review to deny relief:

> Having reviewed petitioner's Rule 29.15 motion, the Court agrees that prejudice was adequately pled. Additionally, the 29.15 court in this case denied petitioner's motion because he failed to "plead or prove" the prejudice necessary. As such, the Court construes petitioner's Rule 29.15 motion to have been denied on the merits rather than on independent and adequate state procedural grounds.

(App. 7-8.)

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[9] The Magistrate also recommended *sua sponte* that a COA issue with respect to this claim. (App. 75.)

2. The Prosecutorial Misconduct Claims

Mr. Callanan raised a claim of prosecutorial misconduct based on the trial prosecutor's injection of improper factual assertions into the case without evidentiary support, including allegations that his father, defense witness Tom Callanan, consorted with reputed organized crime figure Sorkis Webb, that his cousin, defense witness Larry Beck, had a long record of criminal convictions under an assumed name, and that the prosecutor had personal knowledge based on his interviews with witnesses that Mr. Callanan was guilty. The state courts denied this claim on the grounds that they were without support in the record. The Magistrate found fault with the state court ruling:

> Upon review of the record, this Court takes issue with the state court's finding that there was no support in the record for the claim that the prosecutor implied personal knowledge of petitioner's guilt, or that petitioner's family was connected to criminal activity.

(App. 71.) Petitioner argued to the district court that it had no duty of deference to a state court decision that was based on the pretense that the alleged misconduct never occurred. The district court ruled:

> While the State courts may not have fully developed their rationale for denying petitioner's claims, the Court does not find that petitioner's claims were ignored. Therefore, the Court will apply the objectively unreasonable standard of review to these claims.

(App. 18-19.) The district court further rejected Petitioner's argument that it should assess the prejudicial effect of the prosecutor's misconduct cumulatively, relying on Eighth Circuit precedent that " 'cumulative error' is not a basis for habeas relief." (App. 19.)

B. A claim avoided on procedural grounds is not "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d)

There is little dispute that when a state court avoids deciding a constitutional claim because of alleged non-compliance with state procedural requirements, that it has not "adjudicated" the constitutional claim "on the merits." Therefore, "if a federal claim has not been adjudicated on the merits, AEDPA deference is not required." *DeBerry v. Portuondo*, 403 F.3d 57, 66 (2nd Cir. 2005), *citing Miranda v. Bennett*, 322 F.3d 171, 178 (2nd Cir. 2003). *Also see, e.g., Hudson v. Hunt,* 235 F.3d 892, 895 (4th Cir. 2000); *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999); *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir. 2004); *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *Walker v. Gibson*, 228 F.3d 1217, 1232 n.6 (10th Cir. 2000). Likewise, where, as in this case, a court which erroneously finds the absence of facts to support a claim has not "adjudicated" that claim "on the merits." *See, e.g., Gonzales v. McKune*, 247 F.3d 1066, 1077 (10th Cir. 2001) *vacated, in part, on different grounds*, 279 F.3d 922 (10th Cir. en banc 2002) (state court's prejudice analysis of Petitioner's *Brady* claim was not "adjudicated on the merits" where the state court found the evidence was not exculpatory); *Taylor v. Maddox,* 366 F.3d 992, 1008 (9th Cir. 2004) (state court findings unreasonable because of state court failure "to consider key aspects of the record"); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (expressing concern that state court "apparently ignored" key testimony). The decision of the court below is out of step with the decisions of this Court and virtually every other circuit in the country and puts Petitioner in the unacceptable position of having used due diligence throughout his efforts to challenge his conviction, but never receiving a decision on the merits of his constitutional claims.

This Court should grant certiorari to review the decision below because "[t]he dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Mr. Callanan's petition was denied by deferring to a state court judgment that *avoided* his constitutional claims for reasons that are indisputably invalid. Where a state denies a prisoner's claims on invalid procedural grounds, denial of independent, plenary federal review of those claims raises serious questions under the Suspension Clause. *See, e.g., Martinez-Villareal v. Stewart*, 118 F.3d 628, 631 (9th Cir. 1997), *aff'd, Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). This case presents a compelling case for this Court to review the denial of an application for a certificate of appealability to correct erroneous resolution of legal questions by the courts below, just as it did in *Tennard v. Dretke*, 124 S. Ct. 2562, 2573 (2004), and *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003).

ISSUE 4

IS THE SUMMARY DENIAL OF A CERTIFICATE OF APPEALABILITY APPROPRIATE WHERE REASONABLE MINDS COULD DIFFER AS TO THE FACTUAL ISSUES AND LEGAL STANDARDS CONTROLLING THE RESOLUTION OF CLAIMS PRESENTED IN QUESTIONS 1, 2 AND 3 ABOVE?

In spite of the factually and legally meritorious arguments discussed in connection with Questions 1, 2 and 3, the courts below, without explanation, denied Mr. Callanan's application for certificate of appealability. The unexplained denial of a COA on a first habeas petition presents an important question because the "dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great

Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Indeed, the doctrine of Abuse of the Writ assumes the availability of an appeal from the denial of a first habeas petition as an important safeguard against injustice:

> In early times, when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given, the reason for that practice ceased and the practice came to be materially changed – just as, when a right to a comprehensive review in criminal cases was given, the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed.

Salinger v. Loisel, 265 U.S. 224, 230-31 (1924). This Court has therefore consistently exercised its jurisdiction on certiorari as part of its "normal function of reviewing possible misapplications of law by the courts of appeals . . . " *Hohn v. United States*, 524 U.S. 236, 251 (1998). *See also, Lynce v. Mathis*, 519 U.S. 433, 436 (1997); *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991) (per curiam). This Court generally exercises its discretion to issue the writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. However, the Court has repeatedly found such compelling reasons to exist where, as here, a lower court has erroneously barred an appeal by an unsuccessful habeas Petitioner, who might have made a substantial showing of the denial of a constitutional right. *See, e.g., Tennard v. Dretke*, 124 S. Ct. 2562, 2573 (2004), and *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003).

When considered in the context of the underlying facts and law governing Mr. Callanan's allegations, the ruling below seems facially inconsistent with this Court's pronouncements on the issuance of certificates of appealability. Under AEDPA, to obtain a COA, Petitioner must also

make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. at 336. This Court further explained that under the controlling standard, a petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were *"adequate to deserve encouragement to proceed further."* *Id. quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). The law "[does] not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338. Rather, "[w]e look to the District Court's application of AEDPA to petitioner's constitutional claims and ask *whether that resolution was debatable amongst jurists of reason."* *Id.* at 336 (emphasis added). Further, "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, *a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."* *Slack v. McDaniel*, 529 U.S. at 484 (emphasis added). As discussed under Questions 1, 2 and 3, above, not only could "jurists of reason . . . disagree with the district court's resolution of [Mr. Callanan's] constitutional claims," (*Miller-El*, 537 U.S. at 327), but those jurists would be correct on the merits.

Mr. Callanan's application for a COA was rejected in a one-page order of the district court and a similar unexplained order issued by the Eighth Circuit Court of Appeals. (App. 77, 1.) In failing to comply with the directive

of F.R.A.P. 22(b)(1) to either issue a COA or "explain why a certificate should not issue," the courts below gave even less consideration to Mr. Callanan's rights than the Fifth Circuit, which merely "[paid] lipservice to the principles guiding issuance of a COA." *Tennard v. Dretke*, 124 S. Ct. at 2569. At least the Fifth Circuit in *Tennard* and in *Banks v. Dretke, supra,* published reasoned opinions explaining why it believed the Petitioners' claims were not debatable among jurists of reason, thus facilitating this Court's review of their decisions.

As in *Tennard, Banks* and *Miller-El*, this Court should grant certiorari in order to correct the erroneous legal conclusions underlying the denial of Mr. Callanan's application for COA, and to clarify for the courts below the appropriate standards and practices guiding the issuance of a COA.

CONCLUSION

For the reasons set forth above, Petitioner Lawrence T. Callanan respectfully prays that this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in his case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2044

Lawrence T. Callanan,	*	
	*	
Appellant,	*	Appeal from the United
vs.	*	States District Court for the
	*	Eastern District of Missouri
Al Luebbers,	*	
	*	
Appellee.	*	

Before MELLOY, MCMILLIAN, and COLLOTON, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

October 14, 2004

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Lawrence T. Callanan, Petitioner,	)	
vs.	)	No. 4:01CV326-DJS
Al Luebbers, Respondent.	)	

MEMORANDUM AND ORDER

Petitioner Lawrence T. Callanan was convicted by a jury in the Circuit Court of the City of St. Louis, Missouri on charges of First Degree Murder and Armed Criminal Action. Petitioner was subsequently sentenced to life imprisonment without the possibility of parole and 30 years imprisonment, to be served concurrently. On March 2, 2001, petitioner filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) for recommended disposition. The Report and Recommendation ("R&R"), issued on October 23, 2003, recommends that petitioner's habeas petition be denied. Both petitioner and respondent have now filed objections to the R&R. The Court, pursuant to 28 U.S.C. §636(b), reviews de novo those portions of the R&R to which objections are made. The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. §636(b).

Background

On the evening of July 1, 1995, petitioner attended a July 4th fair in downtown St. Louis with Kara Weinstein, Lisa Schaefer, and Leo McLaughlin. The four had met around 7:30 p.m. at a barbeque at the home of an acquaintance, Tom Lassen, located on Bent Twig Lane. From there the group traveled in Ms. Weinstein's car to downtown St. Louis. While on the way to the July 4th fair, the group began drinking. Ms. Weinstein testified at trial that she drank beer while the men drank vodka. The group left the fair around 10:30 p.m. and attended a party at a friend's house for approximately 30 minutes. The group than left this party and went to another party which was sponsored by the North County Youth Association ("NCYA"). On the way to the NCYA party the group stopped and purchased some additional vodka.

After about one hour an the NCYA party, Ms. Weinstein and Mr. McLaughlin drove Ms. Schaefer home and then returned to the party. After returning to the party, Ms. Weinstein talked with various friends until about 2:00 a.m. when she approached the petitioner and Mr. McLaughlin to ask if they were ready to leave. Ms. Weinstein testified that petitioner and Mr. McLaughlin were talking with John Schuh. Prior to this encounter, Ms. Weinstein testified that she had never before met Mr. Schuh or his family. Ms. Weinstein also testified that petitioner and Mr. McLaughlin were whispering behind Mr. Schuh's back and that they were "play-fight[ing]" with him. Trial Tr. at p. 268. Ms. Weinstein, Mr. McLaughlin, petitioner, and Mr. Schuh then left the NCYA party in Ms. Weinstein's car and returned to the Lassen house.

On the way to the Lassen house, petitioner asked Ms. Weinstein to stop at his house. They stopped in front of petitioner's house, where he lived with his father, and petitioner went inside the house for about one minute. After petitioner returned to the car, the group made the short drive to the Lassen house, where Ms. Weinstein dropped the three men off. Ms. Weinstein testified that as she left the Lassen house the only persons she saw outside the home were the petitioner and Mr. Schuh. Mr. Schuh was standing on the steps to the Lassen home and petitioner was standing behind him. Ms. Weinstein pulled forward on Bent Twig Lane to the intersection of Bent Twig Lane and Meadowdale. As she turned left on Meadowdale, Ms. Weinstein testified that she heard a gunshot followed by three additional gunshots. Ms. Weinstein then turned around on Meadowdale and looked down Bent Twig Lane to her right, where she saw petitioner walking toward his truck. Ms. Weinstein continued down Meadowdale, through Bent Twig Lane, but again turned around and approached the corner of Meadowdale and Bent Twig Lane. As she approached Bent Twig Lane, Ms. Weinstein testified that petitioner nearly hit her car with his truck as he made a right turn onto Meadowlane. Ms. Weinstein testified that from the point at which she dropped the men off until she saw petitioner driving away in his truck was less than a minute, " a matter of seconds." Trial Tr. at 282.

The body of John Schuh was discovered outside of the Lassen house. Mr. Schuh had been shot four tines, once in the back of the head and three times in the abdomen. Mr. Schuh was pronounced dead at the scene at 3:32 a.m on July 2, 1995. The four bullets came from the same gun,

which was either a Smith & Wesson or Ruger .38 or .357 caliber revolver.[1] On the same morning as the murder, police went to the home of petitioner to question him about the murder and the party he had attended. Petitioner's father informed the police that petitioner was not at home. About six weeks later, a police officer returned to petitioner's home where he found petitioner asleep in his room. The petitioner voluntarily went with the officer to the police station where he was arrested. Following a trial in the Circuit Court of the County of St. Louis, a jury convicted petitioner for the murder of John Schuh on April 1, 1996.

Petitioner's direct appeal asserted five issues, three of which are also raised in his current habeas petition. The Missouri Court of Appeals affirmed his conviction in a summary order pursuant to Mo.Sup.Ct.R. 30.25(b). Petitioner then sought post-conviction relief under Mo.Sup.Ct.R. 29.15 ("Rule 29.15"). In his Rule 29.15 motion, petitioner asserted numerous claims, many of which are also asserted in his habeas petition. After holding a hearing on two of petitioner's claims, concerning petitioner's right to testify and an alleged biased juror, the state court denied petitioner's motion for post-conviction relief on all claims. The Missouri Court of Appeals affirmed in all respects.

Petitioner then filed his federal habeas petition with this Court. The petition contains 11 claims for relief including five claims of ineffective assistance of counsel

[1] At trial the prosecution's firearm expert, William Crosswhite, testified that the exact caliber could not be determined as the bullets were badly mutilated.

(claims 1, 2, 3, 4, and 9), four claims of prosecutorial misconduct (claims 5, 6, 7, and 11), a claim of improper exclusion of evidence (claim 8), and a claim of insufficient evidence (claim 10)[2]. Petitioner also sought an evidentiary hearing on claims 3, 4, 5, 6, and 9. The R&R recommended that the petition for habeas corpus relief as well as the request for an evidentiary hearing be denied in all respects. Petitioner timely objected to the R&R as it relates to each of his claims. Respondent also objected to the R&R to the extent that it found that claims 3, 4, 5, 6, and 9 were not procedurally barred and that claim 11 was not barred by the statute of limitations or procedurally barred. The Court will review de novo those portions of the R&R to which objections have been made. 28 U.S.C. §636(b).

Analysis

I. Procedural Default

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "This rule applies whether the state law ground is substantive or procedural." *Id.* Therefore, when a petitioner failed to follow applicable state procedural rules in raising his claims before the state courts, those claims are procedurally barred unless the petitioner can show cause and prejudice for the default or unless petitioner can show that the federal court's failure to consider the claims would be

[2] Claim 11 was not raised in the initial petition for habeas but was raised by amendment on June 10, 2002.

a miscarriage of justice because he is actually innocent. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Brown v. Luebbers*, 344 F.3d 770, 775 (8th Cir. 2003).

Respondent contends that claims 3, 4, 5, 6, and 9 of petitioner's habeas petition are procedurally barred as petitioner failed to properly plead prejudice in petitioner's Rule 29.15 motion. The Eighth Circuit has stated that because "Rule 29.15 is the exclusive procedure for post-conviction relief in Missouri, claims not properly asserted under the rule are procedurally defaulted." *Oxford v. Delo*, 59 F.3d 741, 777 (8th Cir. 1995). However, the *Oxford* decision concerned the Missouri procedural rule of submitting a verified Rule 29.15 motion. In this case, it appears that petitioner met all of the procedural rules required in filing his 29.15 motion.

The current action is more analogous to *Brown v. Luebbers*, 344 F.3d 770 (8th Cir. 2003), where the movant's claims were found to be procedurally defaulted. *Id.* at 775. The analysis in *Brown* rested, in part, on the appellant's failure to adequately plead prejudice in his Rule 29.15 motion. *Id.* at 774-75. However, in *Brown* the appellant admitted that his claims were not properly presented in his Rule 29.15 motion. Here, petitioner believes that his claims were properly presented to the Rule 29.15 court. Having reviewed petitioner's Rule 29.15 motion, the Court agrees that prejudice was adequately plead. Additionally, the Rule 29.15 court in this case denied petitioner's motion because he failed to "plead or prove" the prejudice necessary. As such, the Court construes petitioner's Rule 29.15 motion to have been denied on the merits rather than on independent and adequate state

procedural grounds. Therefore, respondent's objections with regard to claims 3, 4, 5, 6, and 9 will be overruled.[3]

Respondent also argues that claim 11 is barred by the applicable statute of limitations or that the claim is procedurally barred. As mentioned above, claim 11 was added to the instant petition by amendment on June 10, 2002. Claim 11 alleges that the prosecutor instructed Ms. Weinstein, the state's key witness, to withhold information that she had seen a second vehicle at the time of the shooting. In support of this claim, petitioner has attached the affidavit of the prosecuting attorney, Mr. Daniel Diemer. In his affidavit, Mr. Diemer states that he encouraged Ms. Weinstein "not to volunteer information about the second car unless she was specifically asked to do so." Diemer Aff., Doc. #34 at p. 5. However, this claim was not raised by petitioner in his state court proceedings. Therefore, respondent argues that claim 11 is now barred by the one-year statute of limitations imposed by 28 U.S.C. §2244(d)(1)(D) and is procedurally barred.

Title 28 U.S.C. §2244(d)(1)(D) imposes a one-year limitation for bringing a habeas claim from "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence." Respondent contends that if petitioner had exercised due diligence in pursuing claim 11 he would have discovered the factual predicate for the claim more than one year before the claim was filed. Following petitioner's trial, Mr.

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[3] The Court notes that even if petitioner's claims 3, 4, 5, 6, and 9 could be construed as having been procedurally defaulted, 28 U.S.C. §2254(b)(2) allows a petition for writ of habeas corpus to be "denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

Diemer left the state prosecutor's office and joined the firm that represented petitioner in his post-conviction state court proceedings. Petitioner's current counsel argues that only fortuitously did he learn of Mr. Diemer's admission while discussing the case with him on March 21, 2002.[4] Other than by this fortuitous discovery, plaintiff had no means of discovering the basis of claim 11. Once petitioner learned of the factual basis, he acted reasonably promptly to seek leave to amend his habeas petition to assert the claim. As such, the Court believes that the claim, is not barred by the statute of limitations or procedurally defaulted. Therefore, respondent's objection to the R&R with regard to claim 11 will be overruled.

II. Petitioner's Objections

Having found that the claims raised in petitioner's habeas petition are not procedurally barred, the Court will now consider petitioner's objections to the R&R. The R&R recommended that each of petitioner's claims be rejected on the merits and petitioner has objected to this recommendation in all respects. Pursuant to 28 U.S.C. §636, the Court will make a de novo determination of each matter objected to. Petitioner's 11 claims each fall into one of four categories: (1) Ineffective Assistance of Counsel (claims 1-4 and 9); (2) Prosecutorial Misconduct (claims 5-7 and 11); (3) Improper Exclusion of Evidence (claim 8); and (4) Sufficiency of the Evidence (claim 10).

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[4] The state courts noted that Mr. Diemer was screened from participation in petitioner's state post-conviction proceedings. Doc. #9, Ex. F. at 75.

1. Standard of Review

Ten of petitioner's 11 claims were adjudicated in state court proceedings. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),

> [a]n application for writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

> First, a state court decision is "contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent."

LaFrank v. Rowley, 340 F.3d 685, 689 (8th Cir. 2003) (*quoting Lockyer v. Andrade*, 538 U.S. 63, 74 (2003)).

> Second, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing

> legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable.

Id. at 1174. Therefore, habeas relief cannot be granted just because a federal court concludes that the state court erred in its application of federal law. *Linehan v. Milczark*, 315 F.3d 920, 925 (8th Cir. 2003). Rather, the test is whether the application was "objectively unreasonable." *Locker*, 538 U.S. at 76. In other words, a federal court "may not grant a writ of habeas corpus unless the relevant state court decision is *both* wrong *and* unreasonable." *Colvin v. Taylor*, 324 F.3d 583, 587 (8th Cir. 2003) (emphasis in original). The "summary nature of the Missouri Court of Appeals opinion does not affect this standard of review." *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). Therefore, petitioner's ten claims which were denied in state court proceedings will be reviewed under the objectively unreasonable standard.

Finally, petitioner's eleventh claim, that the prosecutor directed the State's key witness – Ms. Weinstein – to withhold information, was not adjudicated in State court. As such, the Court will review this claim under the pre-AEDPA standard of review. *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). Under this standard the petitioner must demonstrate a "reasonable probability that the error complained of affected the outcome of the trial." *Id.* at 866.

2. Ineffective Assistance of Counsel (Claims 1-4, 9)

To prevail on a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance was deficient as a matter of constitutional law and that petitioner was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A constitutionally deficient performance is one that falls "outside the wide range of professionally competent assistance." *Id.* at 690. A defendant is prejudiced by deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. However, "strategic choices made [by trial counsel] after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690.

Petitioner asserts five claims of ineffective assistance of counsel. He believes that counsel was ineffective for having failed to strike a juror (claim 1), for having failed to call petitioner as a witness (claim 2), for having failed to call witnesses to impeach the prosecution's key witness (claim 3), for having failed to present evidence to refute the prosecutor's arguments (claim 4), and for having failed to object at trial or argue or. appeal that the prosecutor was engaged in misconduct (claim 9). Following an evidentiary hearing on claims 1 and 2, the state court denied all five claims on the merits. After careful consideration, the Court cannot say that the state court's denial of these claims was objectively unreasonable.

First, with regard to trial counsel having failed to strike a juror, petitioner "must show that the juror was actually biased against him." *Mack v. Caspari*, 92 F.3d 637, 642 (8th Cir. 1996; *see also Johnson v. Armontrout*,

961 F.2d 748, 754 (8th Cir. 1992) (finding that petitioner had the "burden of proving that members of his jury were actually biased"). "Whether a juror is biased 'is a question of fact, and we defer to a state court finding of juror bias if it is fairly supported by the record.'" *Mack*, 92 F.3d at 642. While the juror in question, Ms. Brown, indicated that her prior grand jury experience may make her more sympathetic to the prosecution, Trial Tr. at p. 141-42, she also indicated that she would have a problem with the prosecution's case where there was only one witness on a circumstantial evidence case. Trial Tr. at p. 59. Here, the prosecution's case was largely based on one witness, Ms. Weinstein, and on circumstantial evidence. As such, it cannot be said Ms. Brown was biased against petitioner. Rather, there was a legitimate reason for trial counsel's decision not to remove Ms. Brown as a juror. As this decision was within "the wide range of professionally competent assistance," the state court's determination that trial counsel was not ineffective in deciding not to remove Ms. Brown from the jury was not unreasonable. *Strickland* at 690.

Second, petitioner contends that his trial counsel was ineffective for failing to call petitioner as a witness. It is well established that petitioner had the "ultimate authority" to decide whether to exercise his constitutional right to testify on his own behalf. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Furthermore, while a waiver of this right cannot be presumed from a silent record, it may be "knowingly and voluntarily waived (by a defendant) if, by his or her silence, the defendant apparently acquiesces to the waiver." *Whitfield v. Bowersox*, 324 F.3d 1009, 1013 (8th Cir. 2003) (*quoting United States v. Washington*, 198 F.3d 721, 724 (8th Cir. 1999)). Petitioner argues that his silence

at trial concerning his constitutional right to testify was due to his youthfulness and inexperience with the criminal justice system, and that it was not an acquiescence to his counsel's advice not to testify.

The determination of "[w]hether counsel advised the defendant about his right to testify and whether [the defendant] accepted the recommendation not to testify are findings of fact." *Whitfield*, 324 F.3d at 1013 (*quoting Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir. 1998). Furthermore, findings of fact by a state court are "entitled to a presumption of correctness." *Owens v. Dormire*, 198 F.3d 679, 682 (8th Cir. 1999). After holding an evidentiary hearing, the Rule 29.15 court found that petitioner and his trial counsel had discussed the risks of petitioner testifying at his trial and that petitioner did not oppose the decision not to testify. The fact that petitioner was willing to testify does not undermine the state court's finding. Many times criminal defendants are willing to testify on their own behalf but decide not to because of the potential consequences associated with testifying. In this case for instance, evidence that the weapon used to kill Mr. Schuh was also used in a second shooting, at which petitioner was present, was excluded prior to the trial. Had petitioner testified, this evidence may have become admissible for impeachment or other purposes. Thus, the fact that petitioner was willing to testify does not mean that petitioner was not persuaded by other factors not to testify. As such, the Court believes it was reasonable for the state court to determine that trial counsel's performance was not unconstitutional with regard to calling petitioner to testify.

Petitioner's third claim of ineffective assistance of counsel is that his trial counsel failed to locate and call

witnesses to impeach the credibility of the state's key witness, Ms. Weinstein. Petitioner contends that such witnesses could have established that Ms. Weinstein was intoxicated at the time of the events she witnessed, that she was romantically involved with the victim's brother, and that she had a history of mental illness. However, petitioner does not contend that he informed his trial counsel of witnesses who possessed this impeaching knowledge; rather, petitioner maintains that his trial counsel had an independent duty to locate and interview such witnesses.

Trial counsel did have a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. However, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland,* 466 U.S. at 691. If a defendant provides his counsel with information about "extremely relevant witnesses" and counsel does not "take reasonable steps to obtain the testimony" of these witnesses, counsel's performance may be found deficient. *Tosh v. Lockhardt,* 879 F.2d 412, 413-14 (8th Cir. 1989). Petitioner does not contend that he informed his counsel of any "extremely relevant witnesses," rather he believes the witnesses, such as individuals who were mentioned in the police report or those whom Ms. Weinstein mentioned in her testimony, were obvious and that counsel therefore had a duty to conduct a reasonable investigation. The Rule 29.15 court found that trial counsel did not provide ineffective assistance of counsel by failing to call such witnesses and denied petitioner's request for an evidentiary hearing.

Petitioner argues that the determination by the Rule 29.15 court was objectively unreasonable because trial counsel did not make a reasonable investigation. However, petitioner does not point to any evidence in the record which would support his contention that trial counsel failed to make a reasonable investigation. To the contrary, a private investigator was hired on petitioner's behalf who testified at trial that he spent at least 50 hours investigating petitioner's case. Trial Tr. at p. 616. The private investigator also testified that part of the investigation was interviewing witnesses. Trial Tr. at p. 609. As there is no evidence to support petitioner's contention that his trial counsel was ineffective in failing to locate and call witnesses to impeach Ms. Weinstein, the state court's determination on this issue was not objectively unreasonable.

Petitioner's fourth claim of ineffective assistance of counsel regards whether petitioner's trial counsel was ineffective for failing to refute arguments made by the prosecutor. At trial, the prosecutor argued that petitioner had retrieved a gun from his home when he asked Ms. Weinstein to stop by his house on the morning of July 2, 1995 and that petitioner attempted to evade the police for six weeks following Mr. Schuh's murder. Petitioner's father testified at trial that he lived with petitioner and that petitioner was his primary care-giver. Thus, there was evidence before the jury that petitioner could have stopped at his home to check on his father. In addition, petitioner's trial counsel presented evidence and argued in his closing that petitioner was living openly in his community following Mr. Schuh's murder and that petitioner visited his fiance on a nearly daily basis. Trial Tr. at 700-01. Trial counsel also argued that petitioner voluntarily went with the police for questioning and that he had not earlier gone

to the police station on the advice of counsel. *Id.* Having done these things, trial counsel's strategic decision not to call additional witnesses to further corroborate these arguments was not ineffective assistance, and the state court's similar conclusion was not "contrary to nor an unreasonable application of the governing principles found in *Strickland.*" *Hall v. Luebbers,* 296 F.3d 685, 693 (8th Cir. 2002) (finding that failure to call a witness whose impact was cumulative and minimal did not constitute ineffective assistance of counsel).

Finally, petitioner argues that his counsel rendered ineffective assistance by failing to preserve or argue on appeal claims concerning the use of improper evidence or misleading tactics by the prosecutor. Petitioner argues that the tactics used by the prosecution included improperly obtaining speculative testimony from Ms. Weinstein that petitioner only pretended to be Mr. Schuh's friend on the night of the murder, improperly implying that petitioner and his family were notorious criminals, and improperly suggesting that a defense witness, Larry Beck, had a lengthy criminal history.

After careful review of the record, the Court believes that the state court's determination on this issue was reasonable. First, the prosecutor merely questioned Ms. Weinstein about her perceptions on the night of the murder and any objection would have been without merit. Trial Tr. 268. When an "objection would have been without merit, a claim of ineffective assistance is not viable." *Gray v. Bowersox,* 281 F.3d 749, 756 at n.3 (8th Cir. 2002). Second, petitioner's counsel did object to comments by the prosecution that insinuated that petitioner and his family

were notorious criminals.[5] Finally, petitioner's counsel also objected when the prosecutor attempted to suggest that Mr. Beck had certain prior convictions that in fact he did not. Trial Tr. at 583. As such, the Court does not believe that the state courts erred in finding that petitioner's representation at trial and on appeal was constitutionally sufficient. Having found no merit to petitioner's claims of ineffective assistance of counsel, petitioner's objections to the R&R with regard to his claims of ineffective assistance of counsel will be overruled.

3. Prosecutorial Misconduct (Claims 5-7 and 11)

Petitioner has alleged that the prosecution (1) withheld the fact that a prosecution witness, Christopher Boelhauf, had a prior criminal conviction (claim 5); (2) allowed the victim's half-brother to accompany the prosecutor on witness interviews (claim 6); (3) made improper comments throughout the trial (claim 7); and (4) encouraged a witness, Ms. Weinstein, to withhold information concerning a second car at the scene (claim 11). With regard to his first three claims of prosecutorial misconduct (claims 5, 6, and 7), petitioner argues that no deference is due the state court denial of these claims because the state courts "simply ignored" his claims. Petitioner's Objections [Doc. #39] at p. 37. While the State courts may not have fully developed their rationale for denying petitioner's claims, the Court does not find that petitioner's claims

[5] For instance, at trial the prosecutor asked petitioner's father if he was in contact with Sorkis Webbe, an alleged leader in St. Louis organized crime. The trial court sustained an objection and instructed the jury to disregard. Trial Tr. at p. 525.

were ignored. Therefore, the Court will apply the objectively unreasonable standard of review to these claims.

"As a general rule, 'prosecutorial misconduct does not merit federal habeas relief unless the misconduct infected the trial with enough unfairness to render a petitioner's conviction a denial of due process.'" *Stringer v. Hedgepeth,* 280 F.3d 826, 829 (8th Cir. 2002) (*citing Louisell v. Dir. of Iowa Dept. of Corr.,* 178 F.3d 1019, 1023 (8th Cir. 1999)). "To carry [this] burden, the petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial – i.e., that absent the alleged impropriety the verdict probably would have been different." *Anderson v. Goeke,* 44 F.3d 675, 679 (8th Cir. 1995) (*citing Hamilton v. Nix,* 809 F.2d 463, 470 (8th Cir.), *cert denied,* 483 U.S. 1023 (1987)). After careful review, the Court does not believe that petitioner's allegations of prosecutorial misconduct are sufficient to warrant habeas relief.

First, petitioner seems to argue that the cumulative effect of the prosecutor's misconduct is sufficient to establish a basis for habeas relief. However, it is clear that "cumulative error" is not a basis for habeas relief. *Wharton-El v. Nix,* 38 F.3d 372, 375 (8th Cir. 1994) (*citing Girtman v. Lockhart,* 942 F.2d 468, 475 (8th Cir. 1991); *Scott v. Jones,* 915 F.2d 1188, 1191 (8th Cir. 1990, *cert denied,* 499 U.S. 978 (1991)). Rather, "each habeas claim must stand or fall on its own." *Scott,* 915 F.2d at 1191. Thus, petitioner's arguments of "cumulative error" do not merit relief.

With regard to the prosecution's failure to disclose a conviction of a government witness, petitioner argues that this information was *Brady* material not disclosed by the prosecution. However, "[w]hen information is readily

available to the defendant, it is not *Brady* material, and the prosecution does not violate *Brady* by not discovering and disclosing the information." *United States v. Jones,* 34 F.3d 596, 600 (8th Cir. 1994) (citations omitted). In other words "'[t]he government cannot be held to have suppressed *Brady* material' when the defendant is in 'a position of parity with the government as far as access to this material.'" *Id.* (*quoting United States v. Johnston,* 543 F.2d 55, 57 (8th Cir. 1976)). Here the Court, similar to the *Jones* court, does not believe that the failure by the prosecution to disclose information regarding a witness's prior conviction was a violation of *Brady*. Thus, the state court's similar conclusion on this issue was not an unreasonable application of federal law.

Petitioner's second claim of prosecutorial misconduct centers around the prosecutor allowing the victim's half-brother to be present during witness interviews, which petitioner believes may have been used for intimidation. Even assuming that this was misconduct by the prosecution, petitioner fails to show any "reasonable probability that the error complained of affected the outcome of the trial." *Anderson,* 44 F.3d at 679. Petitioner identifies only one witness, Mr. Claggett, for whose interview the victim's half-brother was present. Furthermore, petitioner presents no evidence to suggest how the witness's testimony was affected by the presence of the victim's half-brother. Thus, this claim of prosecutorial misconduct through witness intimidation fails to provide a basis for habeas relief.

Petitioner's third claim of prosecutorial misconduct is that the prosecutor made improper statements throughout the trial. However, to provide a basis for habeas relief, "it

is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Mack*, 92 F.3d at 643 (citation omitted). "Rather the 'relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (*quoting Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). While petitioner argues that the prosecution made improper, testimonial comments throughout the trial, petitioner has failed to direct the Court to any particular comments made by the prosecution that would warrant habeas relief. In addition, the trial court sustained objects by petitioner's trial counsel concerning some of the prosecution's comments and the jury was told to disregard the comments.[6] Therefore, the Court finds that the prosecutor's comments did not "so infect" the trial as to result in a denial of due process. Thus, petitioner has failed to establish that he is entitled to habeas relief based on improper comments by the prosecution.

Petitioner's final claim of prosecutorial misconduct alleges that the prosecutor instructed the State's key witness, Ms. Wienstein, to withhold information regarding a second car at the scene of the crime. As mentioned above, this claim was not adjudicated on the merits during state court proceedings and will be reviewed under the pre-AEDPA standard for 'reasonable probability that the error complained of affected the outcome of the trial." *Robinson*, 278 F.3d at 866.

In support of his petition for writ of habeas corpus, petitioner has filed the affidavit of the prosecutor at trial,

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[6] See note 5.

Mr. Dan Diemer. In his affidavit, Mr. Diemer admits that Ms. Weinstein mentioned seeing a second car at the scene but that he instructed Ms. Weinstein "not to volunteer any information about the second car unless she was specifically asked to do so." Diemer Aft. [Doc. #34] at p. 5. In his opening argument at trial, Mr. Diemer told the jury that Ms. Weinstein would testify that she only saw one car. Trial Tr. at p. 231. Petitioner believes that these misrepresentations by Mr. Diemer affected the outcome of the trial. Specifically, petitioner argues that without these comments and misrepresentations by the prosecution the jury could have concluded that a second person, Ronnie Claggett, left the scene following the shooting and thereby inferred that it was Mr. Claggett who had committed the crime rather than petitioner.

Petitioner's argument is undermined however by the fact that the jury did hear evidence at trial that Mr. Claggett left the scene soon after the shooting. Mr. Claggett testified at trial that he left the Lassen house soon after the shooting. Trial Tr. at p. 360-68. In addition, the defense called residents of the Bent Twig Lane community who testified that a car, matching the description of Mr. Claggett's car, had left the scene soon after the shooting. Trial Tr. 572-74. Therefore, even without corroborating testimony from Ms. Weinstein, there was sufficient testimony and evidence for the jury to determine that Mr. Claggett had left the scene soon after the shooting. Thus, petitioner has failed to show "that absent the alleged impropriety the verdict probably would have been different." *Anderson,* 44 F.3d at 679. Therefore, this claim of prosecutorial misconduct also fails to provide a basis for habeas relief.

4. Improper Exclusion of Evidence (Claim 8)

Petitioner claims that the trial court erred in excluding evidence of another murder that occurred on the same night as Mr. Schuh's murder. Petitioner also raised this claim in his state court proceedings, and the state courts rejected the claim. The Magistrate judge recommends that petitioner's claim be denied and petitioner has objected to this recommendation. After reviewing the evidence presented and the offer of proof made by defense counsel at trial, Trial Tr. at 628-631, the Court does not believe that the state court's denial of petitioner's claim was an objectively unreasonable application of federal law.

"Rulings on the admission or exclusion of evidence in state trials rarely rise to the level of a federal constitutional violation." *Nebinger v. Ault,* 208 F.3d 695, 697 (8th Cit. 2000). Indeed, habeas relief is only appropriate where the exclusion was "gross, conspicuously prejudicial or of such import that the trial was fatally infected." *Brown,* 344 F.3d at 777. In this case, the defense made an offer of proof that another murder had taken place on the same night as Mr. Schuh's murder and that a handgun was used in both murders. The defense also suggested that the murder occurred at a known crack house and that Mr. Schuh was familiar with the residence. The trial court excluded the evidence for lack of a direct link between the two killings and the state courts affirmed this ruling. Given the scanty evidentiary link between the two shootings the Court does not believe that these rulings were objectively unreasonable or that the exclusion of the evidence was sufficient to establish a due process violation. Thus, the exclusion of evidence does not provide a basis for habeas relief.

5. Sufficiency of the Evidence (Claim 10)

Due process forbids a criminal conviction unless the evidence before the jury was sufficient to enable rational jurors to find every element of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 316 (1979). The applicable standard for federal habeas corpus review under §2254 is whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319 (emphasis in original). In addition, the law does not require that a conviction be supported by direct rather than circumstantial evidence, so long as the evidence as a whole satisfies the applicable burden of proof to support the required findings. "A conviction may rest on indirect or circumstantial evidence." *United States v. Jackson,* 99-2657, 2000 WL 193395, *1 (8th Cir. Feb. 18, 2000); *Hill v. Norris,* 96 F.3d 1085, 1088-89 (8th Cir. 1996) (rejecting a habeas petitioner's claim "that the circumstantial evidence supporting his guilt is insufficient because it fails to exclude other factual scenarios consistent with his innocence"). After careful consideration, the Court believes the evidence that plaintiff and the victim were alone together moments before the shooting, the conflict between plaintiff and the victim earlier in the evening, and the forensic physical evidence constituted sufficient evidence to support petitioner's conviction. Therefore, petitioner's claim for habeas relief based on insufficiency of the evidence should be denied.

6. Denial of Evidentiary Hearing

Finally, petitioner argues that the magistrate judge erred in denying petitioner's request for an evidentiary

hearing. The Court disagrees. Generally, an evidentiary hearing shall not be held when the petitioner "failed to develop the factual basis for a claim in State court proceedings." 28 U.S.C. §2254(e)(2). In addition, even if a hearing is not precluded under §2254(e) and "even if the facts [petitioner] seeks to prove are true, if those facts would not entitle him to relief," an evidentiary hearing is not required. *Johnston v. Luebbers,* 288 F.3d 1048, 1059 (8th Cir. 2002). Thus, an evidentiary hearing is not necessary in this case.

III. Conclusion

After careful consideration, the Court finds that the state courts' adjudication of petitioner's claims was not based on an independent state procedural rule. Therefore, respondent's objections to the R&R will be overruled. The Court also finds that the state courts' denial of petitioner's claims was not objectively unreasonable. With respect to petitioner's claim that was not asserted in his state court proceedings, the Court finds that there is not a reasonable probability that the asserted prosecutorial misconduct affected the outcome of the trial. Thus, petitioner's objections to the R&R will also be overruled.

Accordingly,

IT IS HEREBY ORDERED that respondent's objections to the magistrate judge's report and recommendation [Doc. #38] are overruled.

IT IS FURTHER ORDERED that petitioner's objections to the magistrate judge's report and recommendation [Doc. #39] are overruled.

IT IS FURTHER ORDERED that the magistrate judge's report and recommendation [Doc. #36] is accepted and adopted.

Dated this 3rd day of March, 2004.

/s/ Donald J. Stohr
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LAWRENCE T. CALLANAN, Petitioner,	)	
v.	)	No. 4:01CV326 DJS (AGF)
AL LUEBBERS, Respondent.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the petition of Missouri state prisoner Lawrence Callanan for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The action was referred to the undersigned Magistrate Judge under 28 U.S.C. § 636(b) for recommended disposition. For the reasons set forth below, the Court recommends that federal habeas relief be denied.

Petitioner was convicted by a jury in the Circuit Court of St. Louis County, Missouri, of one count of first-degree murder and one count of armed criminal action for the July 2, 1995 shooting death of John Schuh. Petitioner was sentenced to concurrent terms of life imprisonment without the possibility of parole and 30 years imprisonment, respectively. The convictions and sentences were affirmed on direct appeal on April 22, 1997. Petitioner's motion for state post-conviction relief was denied after an evidentiary hearing, and this denial was affirmed on appeal on April 25, 2000.

In the present action, commenced on March 2, 2001, petitioner asserts that his constitutional rights were violated in the following ways:

> (1) Trial counsel was ineffective for failing to strike a juror who indicated she was prejudiced against criminal defendants and in favor of the State;
>
> (2) Trial counsel was ineffective for failing to call petitioner as a witness, knowing petitioner wished to testify;
>
> (3) Trial counsel was ineffective for failing to locate and call witnesses who would have testified that the State's key witness was extremely intoxicated at the time of the events to which she testified, had been romantically involved with the victim's half brother (William Losing), and had psychiatric problems;
>
> (4) Trial counsel was ineffective for failing to present evidence to refute the prosecutor's arguments that petitioner stopped by his father's house prior to the shooting to get a gun, and that he evaded the police for six weeks after the shooting;
>
> (5) The State failed to disclose a prior conviction of one of its witnesses (Christopher Boelhauf);
>
> (6) The State allowed the victim's half brother to be present during pre-trial interviews and in the witness room during trial, which intimidated witnesses;
>
> (7) During trial, the prosecutor improperly implied that he was aware of evidence of petitioner's guilt that was not before the jury,

insinuated that petitioner and his family were involved in organized crime, and commented upon petitioner's failure to make a statement to the police after the shooting;

(8) The trial court improperly excluded evidence of another murder which occurred on the same night and in the same area as the murder in this case and which would have suggested another possible perpetrator of the crimes for which petitioner was convicted;

(9) Trial and appellate counsel were ineffective in failing to object at trial and argue on appeal that it was improper for the prosecutor to solicit the State's key witness's opinion that at a party preceding the murder, petitioner was pretending to be friends with the victim; appellate counsel was ineffective in failing to raise on appeal the prosecutor's cross-examination of a defense witness (Lawrence Beck) with convictions he did not have;

(10) There was insufficient evidence on the issue of the identity of the perpetrator and on the issue of deliberation to support petitioner's convictions; and

(11) The prosecutor instructed the State's key witness to withhold from defense counsel that she saw a vehicle besides petitioner's leave the scene of the crimes; and allowed this witness to testify that she did not see a second vehicle.

Claim 11 was raised in an amendment, filed on June 10, 2002, to the petition. Petitioner requests an evidentiary hearing on claims 3, 4, 5, 6, and 9. The State opposes the request for an evidentiary hearing, arguing that this Court is procedurally barred from reviewing these claims,

as well as claims 1 and 2; and, alternatively, that the state courts' adjudication of these claims was not unreasonable. The State also argues that claim 11 is time barred, procedurally barred, and without merit, and that habeas relief should be denied on the remaining claims (7, 8, and 10) because the state courts' adjudication of them was not unreasonable.

I. State Court Proceedings

Jury Selection

Toward the beginning of voir dire, the prosecutor asked the venirepanel if anyone would have difficulty finding a defendant guilty based solely upon circumstantial evidence presented by one witness. Venireperson Mary Brown stated, "I think I'd have trouble with just one person. . . . It would be like one word against the other word. I think I would need more witnesses." Resp. Ex. A at 59-60. Upon further questioning by the prosecutor, Ms. Brown acknowledged that facts could be established beyond a reasonable doubt even though witnesses testified to different versions of the facts. *Id.* at 60-62.

Later during voir dire, defense counsel asked the panel whether anyone who had previously served on a jury did not enjoy the experience. The following exchange ensued between counsel and Ms. Brown:

> Brown: I had grand jury duty so I liked the fact I didn't have to make a decision whether they were guilty or not guilty.
>
> * * *

Counsel: . . . Okay. Anything about your grand jury experience that was – you'd not want to serve on what's called a petit jury, this jury here?

Brown: No, but I like it better, just because you didn't have to decide guilt or not guilty.

Counsel: Are you hesitant to do that?

Brown: Right.

Counsel: Okay. Hesitant but not unwilling?

Brown: Well, I'd prefer not to.

Counsel: Okay. But you are not refusing to. It's tough. I'm not saying this is an easy job.

Brown: I'm not refusing but I'd prefer not to.

Counsel: Prefer not to. Are you worried that you can't be fair to either side? Let me ask it a little different way. You sat on a grand jury where all you mainly heard was from the prosecution. Is that a fair statement?

Brown: Right.

Counsel: Police and other witnesses and the prosecutor. You didn't hear from the other side, right?

Brown: Right.

Counsel: . So you are kind of used to that. But you have to deal with both sides in a courtroom.

Brown: So maybe I'm a little prejudiced from that standpoint.

Counsel: Okay. Prejudiced in favor of the state because of that?

Brown: I will assume so.

Counsel: Yeah, okay. Well, that's fair. Do you think that you can set that aside in this case?

Brown: I'm not sure.

Counsel: You are not sure, okay. That's fair enough.

Id. at 141-42.

Neither side moved to strike Ms. Brown for cause or used a peremptory strike to remove her from the panel, and she was seated as a juror.

Evidence at Trial

Trial commenced on April 1, 1996. The State's key witness was 19-year old Kara Weinstein, the only witness who placed petitioner at the scene of the crimes immediately before and after the shots were fired. Ms. Weinstein testified that on the evening of July 1, 1995, she and a friend, Lisa Schaefer, arranged to meet petitioner, then aged 19, and Leo McLaughlin at the home of an acquaintance, Tom Lassen, in North St. Louis County. The plan was to go from there to the July 4th fair in downtown St. Louis. A few minutes after the women arrived at the

Lassen house, petitioner drove up in his pickup truck and parked it across the street from the house. Ms. Weinstein, Ms. Schaefer, Mr. McLaughlin, and petitioner proceeded to the fair in Ms. Weinstein's car at about 7:30 p.m., with Mr. McLaughlin driving, because Ms. Weinstein did not like to drive downtown. During the drive, Ms. Weinstein drank a beer and the men drank vodka. While at the fair, Ms. Weinstein drank another beer. *Id.* at 255-61.

Ms. Weinstein further testified that at about 10:30 p.m., the four left the fair and drove to a party at a friend's house, with Mr. McLaughlin again driving. They left this party about one-half hour later and Mr. McLaughlin drove the three others to get more vodka and then to a large outdoor party sponsored by the North County Youth Association (NCYA), arriving at approximately 11:30 p.m. Ms. Weinstein drank another beer at the NCYA party. At approximately 1:00 a.m., she drove Ms. Schaefer home, accompanied by Mr. McLaughlin, and returned to the party. Mr. Schuh was also at the party. Ms. Weinstein met Mr. Schuh for the first time at approximately 2:00 a.m., when she approached Mr. McLaughlin and petitioner to tell them she was ready to go home. Ms. Weinstein testified that she had never before met Mr. Schuh or any members of his family. *Id.* at 262-67.

Ms. Weinstein testified that Mr. Schuh, petitioner, and Mr. McLaughlin were talking when she approached them. She felt that petitioner and Mr. McLaughlin were talking behind Mr. Schuh's back, and that "they were acting like they liked him," but she "got the feeling that they didn't like him." *Id.* at 268. Ms. Weinstein, Mr. McLaughlin, petitioner, and Mr. Schuh walked to Ms. Weinstein's car to leave. Ms. Weinstein testified that on the way to the car

the three men "were joking around kind of how guys do when they play-fight." *Id.*

The four individuals, including petitioner and Mr. Schuh, got in Ms. Weinstein's car, and Ms. Weinstein proceeded to drive back to the Lassen house. On the way, petitioner asked Ms. Weinstein to stop at his house, which was a few blocks away from the Lassen house. Petitioner lived there with his father, who was confined to a wheelchair. Ms. Weinstein did so. Petitioner got out of the car, went into the house, and returned to the car a minute or so later.

The Lassen house was on Bent Twig Lane, one house from the corner of Meadowland Drive. Upon arriving there, Ms. Weinstein let the three men off in front of the house and saw them walk to the front door, with Mr. McLaughlin going first, followed by Mr. Schuh and then petitioner. She continued down to the end of the street, which was a cul-de-sac, turned around, and drove back up the street, passing the Lassen house on her left as she drove towards Meadowland Drive. Ms. Weinstein testified that as she passed the house, she saw Mr. Schuh standing by the front door, which was open, and petitioner standing near him. The flood lights were on, and she saw no one else in the front yard. *Id.* at 272-75, 250-53.

Ms. Weinstein proceeded to the corner and made a left turn onto Meadowland Drive, at which point she heard a gunshot followed by three more shots. She turned into the driveway of the first house off the corner, turned the car around, and drove back to the corner of Bent Twig Lane. Ms. Weinstein looked down Bent Twig Lane to her right and saw petitioner walking to his truck. She then drove forward, turned her car around again, and as she

approached the corner once more, petitioner's truck made a right turn off Bent Twig Lane onto Meadowland Drive, so that the two vehicles were facing each other. Petitioner's headlights were off. He proceeded straight down Meadowland Drive, and Ms. Weinstein made a left turn back onto Bent Twig Lane and stopped in front of the Lassen house. *Id.* at 277-79. Ms. Weinstein testified that she did not see any other persons or vehicles moving near the Lassen house when she saw petitioner walking to his truck. *Id.* at 281.[1]

When Ms. Weinstein got back to the Lassen house, people were outside in front of the house, including Mr. McLaughlin, whom she called over and asked what happened. Mr. McLaughlin got in Ms. Weinstein's car and told her to drive him home. After driving for about a minute and a half, Mr. McLaughlin told Ms. Weinstein to drive back to the Lassen house. When they got there, Ms. Weinstein got out of the car and saw Mr. Schuh's body, which had been shot. *Id.* at 252-55, 277-78.

On cross-examination, Ms. Weinstein testified that she gave the same version of events to police immediately after the incident and to the grand jury, and that she was not friends with Mr. Schuh's family and had not been influenced by the family to change her story at trial. *Id.* at 291-92. Defense counsel proceeded to question Ms. Weinstein about what he believed were inconsistencies between Ms. Weinstein's trial testimony and her statements to the police and grand jury. *Id.* at 298-303.

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[1] During opening argument, the prosecutor told the jury that Ms. Weinstein would so testify, i.e., that she saw no other car leave the scene of the crimes. Resp. Ex. A at 231.

Ms. Weinstein again testified that she did not see anyone other than petitioner drive away from the scene of the shooting. She also testified that she did not see Ron Claggett or his car when she returned to the Lassen house minutes after the shooting. *Id.* at 310-11. Mr. Claggett would later testify that he was at the party in the Lassen house when the shots were heard, and that within several minutes he left the scene in his car, which had been parked on the street. Counsel asked Ms. Weinstein if she was sure she did not drink more than four beers during the hours preceding the crimes, and she responded that she was sure. *Id.* at 313.

Several individuals who were in the kitchen of the Lassen house at the time of the shooting testified that Mr. McLaughlin entered the kitchen about 30 seconds to one minute before the first gunshot was heard. When they went to the front door, they saw Mr. Schuh's body. None saw petitioner or heard his truck drive away from the house. As noted above, Mr. Claggett was also at the party. He testified that he was in the living room of the Lassen house when he heard the shots. A few minutes later, he saw Mr. Schuh's body on the porch and panicked because he did not want to be involved. He left the house, got into his purple Camaro which was parked outside, and drove away. As he approached the corner, he passed a car that was driving in the opposite direction toward the house. *Id.* at 349-361. During Mr. Claggett's testimony, the prosecutor asked him, "Are you afraid of defendant?" Mr. Claggett replied no, and the prosecutor proceeded to ask him, "Are you afraid of the defendant's family?" Mr. Claggett again responded no. Defense counsel's objection was sustained, and the jury was instructed to disregard the questions and answers. *Id.* at 349-50. Two neighbors testified that they

saw a car that looked like Mr. Claggett's drive away from the scene of the crimes at the time in question. *Id.* at 430, 573.

The police were called to the Lassen house, and paramedics pronounced Mr. Schuh dead at the scene at 3:32 a.m. *Id.* at 462. A medical examiner testified that there were four gunshot wounds to Mr. Schuh's body – one entered from behind the left ear and the others entered the abdomen from above the body. *Id.* at 329-31. All four bullets were fired from the same gun, which was either a Smith & Wesson or Ruger .38 or .357 caliber revolver. *Id.* at 504-06.

Petitioner's father, Thomas Callanan, testified that petitioner lived with him and took care of him. He testified that when petitioner went out, petitioner would stop by to see how he was doing, as petitioner did on the night in question. Mr. Callanan had been very ill, and petitioner got him a glass of water and asked how he was. *Id.* at 516-17. Mr. Callahan acknowledged that on the morning of the murder, police officers came to his house and told him that they wanted to question petitioner about a murder that had been committed at a party petitioner had attended. Petitioner was not home at the time, and when he returned later that day his father told him the police wanted to question him about the murder. Approximately six weeks later, on August 16, 1998, a police officer returned to the Callanan house, and petitioner, who was asleep in his room, voluntarily went with the officer to the police station and was arrested. *Id.* at 509-515.

Mr. Callanan testified that he did not have petitioner turn himself in earlier for questioning because he was afraid for his son's safety,[2] and because an attorney he had contacted advised him not to turn petitioner in. *Id.* at 522, 525. After Mr. Callanan stated that during these six weeks he had made calls to several relatives, the prosecutor asked him, "Did you call anybody else . . . maybe Sorkis Webbe as well?"[3] Defense counsel's objection to the question was sustained, and the jury was instructed to disregard the question. *Id.* at 525.

The State also presented the testimony of Christopher Boelhauf, a friend of Mr. Schuh's, who was at the NCYA party on the night in question. He testified that at about midnight, he saw petitioner tip over in a lawn chair in which he was sitting. Petitioner started to yell at Mr. Schuh and bumped his chest into Mr. Schuh several times, and the two men pointed their fingers at each other. *Id.* 444-47.

Lawrence Beck, petitioner's cousin, testified for the defense that petitioner came to his house at about 3:00 a.m. on the day of the crimes, and the two watched television together. Mr. Beck testified that petitioner often came over, and that he did not notice anything unusual about petitioner that morning. On cross-examination, the State asked Mr. Beck about several prior convictions, which Mr. Beck denied and which the prosecutor was not able to substantiate. *Id.* at 577-87. Petitioner's fiancee at the time

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[2] The court sustained the prosecutor's objection to Mr. Callanan's statement that the Losing family said they were going to murder petitioner. *Id.* at 520.

[3] According to petitioner, Sorkis Webbe was a well-known figure in organized crime in St. Louis.

testified that she visited petitioner at his father's house almost every day during the time between the murder and petitioner's arrest. *Id.* at 588-89.

Petitioner did not testify on his own behalf. In closing argument, the prosecutor told the jury, "Ronnie Claggett saw what happened that night, but Ronnie Claggett is afraid to tell you." *Id.* at 705. Defense counsel did not raise an objection to this comment. The prosecutor also stated during closing argument that the investigation of the crime was frustrated by petitioner's "flight," and noted that petitioner did not turn himself in for six weeks after knowing that the police wanted to question him. *Id.* at 656, 664. The prosecutor noted that Mr. Claggett left the scene in his car soon after the shooting. *Id.* at 663.

Defense counsel pointed out during closing argument that Ms. Weinstein had referred to Mr. Schuh as "Johnny," indicating familiarity with him and his family. *Id.* at 680-81. He called the jury's attention to the alcohol that Ms. Weinstein and the people she was with consumed on the night of the murder, and that Ms. Weinstein had Mr. McLaughlin drive her car most of the night. Counsel argued that this suggested she was too drunk to drive until late in the evening when she had sobered up a bit. *Id.* at 683-84.

Defense counsel addressed the issue of petitioner's "flight" by noting certain facts which showed petitioner was not in hiding during the six weeks until he turned himself in: petitioner slept at his own house during most of the six weeks; petitioner's fiancee visited him at his house almost daily during this time; and an attorney whom petitioner's father had consulted advised that petitioner not turn himself in. *Id.* at 698-701.

Prior to trial, the court granted petitioner's motions to exclude evidence that, among other things: (1) petitioner's family was connected to organized crime; (2) in March 1995, petitioner pled guilty to careless and imprudent driving and to a misdemeanor weapons charge and received two years probation; the weapon involved was a revolver of the kind used to kill Mr. Schuh; and (3) petitioner was charged in March 1995 with a crime related to a weapon being shot into a vehicle, at which petitioner was present; ballistic reports indicated that the weapon involved matched the weapon used to kill Mr. Schuh; (4) when Ms. Weinstein returned to the Lassen house after hearing the gunshots, McLaughlin said to her, "[Petitioner] just did something stupid"; and (5) on the way to the fair, petitioner and Mr. McLaughlin offered Ms. Weinstein and Ms. Schaefer acid (LSD).

The trial court also granted the State's motion to exclude evidence of another murder which was committed at about the same time and in the same neighborhood as the murder of Mr. Schuh. Resp. Ex. B at 47-49 (motion), Resp. Ex. A at 206 (ruling). Petitioner's offer of proof asserted the following: Eugene Bonnard was shot once point blank by a handgun, and a drug dealer named Carlos Perry was under indictment for the murder. At about midnight on July 1, 1995, the night before Mr. Schuh's and Mr. Bonnard's murders, a telephone call was made from the home of Mr. Schuh's sister-in-law to her cousin, who owned the house where Mr. Bonnard was murdered, a known crack house. Mr. Schuh was at his sister-in-law's house when the call was made. Cocaine was found on Mr. Schuh's body, and he was a known narcotics user. Resp. Ex. A at 628-31.

Direct Appeal

Petitioner raised five issues on direct appeal, including claims 7 (improper questions and comments by the prosecutor), 8 (exclusion of evidence about Mr. Bonnard's murder), and 10 (sufficiency of the evidence), raised in his federal habeas petition. The alleged improper questions and comments by the prosecutor included: asking Mr. Callanan (petitioners father) if he had telephoned Sorkis Webbe; asking Mr. Claggett if he was lying because he was afraid of petitioner or his family; implying to the jury that Mr. Claggett told the police that petitioner was the perpetrator; asking a police officer if he knew Mr. Callanan from previous contacts; referring to the fact that Mr. McLaughlin made a comment to Ms. Weinstein when she returned to the Lassen house after the shooting; telling the jury that Ms. Weinstein was not the kind of person who would lie; and urging the jury to infer petitioner's guilt on the basis of his not acceding to questioning by the police for six weeks following the shooting. Resp. Ex. C.[4]

The Missouri Court of Appeals affirmed petitioner's convictions and sentences in a summary decision. *State v. Callanan*, 948 S.W.2d 678 (Mo. Ct. App. 1997).

State Post-conviction Motion

Petitioner then sought post-conviction relief under Missouri Supreme Court Rule 29.15. In his amended

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[4] Petitioner's remaining two claims on direct appeal were that the trial court erred in admitting into evidence photographs of Mr. Schuh's body and in overruling petitioner's objection to the prosecutor's closing argument inferring that petitioner failed to accede to police requests for an interview after Mr. Schuh's death.

petition he asserted numerous claims of ineffective assistance of trial and/or appellate counsel, including claims 1 (failing to strike Ms. Brown from the jury); 2 (failing to honor petitioner's right to testify); 3 (failing to effectively impeach Ms. Weinstein); 4 (failing to refute the prosecutor's arguments that petitioner stopped by his father's house to get a gun, and that petitioner evaded the police for six weeks after Mr. Schuh's murder); and 9 (failing to preserve for, and argue on, appeal that petitioner's right to a fair trial was violated by the prosecutor's improper impeachment of Mr. Beck and solicitation of Ms. Weinstein's opinion that petitioner was pretending to be friendly to Mr. Schuh at the NCYA party) of his federal habeas petition.

Petitioner also raised claims of prosecutorial misconduct, including claims 5, 6, and 7 of his federal habeas petition (the prosecutor's failure to disclose that Mr. Boelhauf had a prior conviction for receiving stolen property; allowing Mr. Losing to be present during pre-trial interviews and in the witness room during trial, which intimidated witnesses; and making improper comments during trial). Resp. Ex. F at 27-54. In addition, petitioner raised the following claim of prosecutorial misconduct:

> Counsel for the state permitted Ms. Weinstein to testify falsely during cross examination that she had observed only Mr. Callahan's truck and no other vehicle departing from the scene of the homicide, despite her purported presence within view of the scene at the time that Mr. Claggett drove his automobile away and necessarily encountered her and despite counsel's knowledge

> that Ms. Weinstein had observed Mr. Claggett's automobile departing from the premises.

Id. at 34.

Evidentiary Hearing

The motion court granted petitioner's request for an evidentiary hearing only with respect to his claims regarding his right to testify and regarding an allegedly biased juror, and denied the request for a hearing with respect to all other claims. The hearing consisted of petitioner's deposition testimony dated September 23, 1998 and trial counsel's testimony dated September 25, 1998.

Petitioner testified that throughout the trial he told his attorney that he wanted to testify, and that counsel told him he would be the last witness. Petitioner testified that when counsel announced in court that the defense rested, petitioner asked counsel, "What about me? I wanted to take the stand," to which counsel responded, "I think we did all right." *Id.* at 84-90.

Petitioner proceeded to recite what his trial testimony would have been. Petitioner's timeline of events on the evening and early morning in question essentially matched Ms. Weinstein's, until the point that she dropped him, Mr. Schuh, and Mr. McLaughlin off at the Lassen house. Petitioner added that Mr. Schuh was using cocaine at the NCYA party. Petitioner testified that after Ms. Weinstein dropped the three men off at the Lassen house, petitioner told the other two men that he was leaving. Mr. McLaughlin entered the house, leaving Mr. Schuh and petitioner standing in front of the house. Mr. Schuh told petitioner that he was meeting someone there to get more

cocaine and suggested that petitioner stay too. Petitioner declined, got in his vehicle, and drove to Mr. Beck's house. He had his radio on and did not hear any shots as he was leaving. *Id.* at 107-12. Petitioner further testified that he did not contact the police right away because his father was concerned for his safety in that he (petitioner) "was being threatened by two different groups of people. . . . [Mr. Schuh]'s brothers, Billy . . . and Russ Losing, and also the man who killed [Mr. Schuh]." *Id.* at 113.

With regard to voir dire, petitioner testified that he made an "X" near Ms. Brown's name in his notes, discussed the matter with trial counsel, and understood that Ms. Brown would not serve on the jury. When he saw her seated as a juror, he asked counsel about it and counsel replied, "I think we did pretty good . . . it's too late now." *Id.* at 116.

Trial counsel testified that he was an experienced criminal lawyer and had met with petitioner 10 to 12 times before trial. He testified that upon learning of petitioner's prior criminal record, petitioner's use of drugs on the night in question, and bad character evidence available to the State, he advised petitioner not to take the stand. Counsel testified that he told petitioner that although counsel had prevailed in motions to exclude much of this evidence, he was concerned that if petitioner took the stand, at least some of this very damaging evidence would come in. Counsel testified that he told petitioner that the decision whether or not to testify was ultimately petitioner's. He further testified that if petitioner had insisted on taking the stand despite counsel's advice, then, in accordance with counsel's practice, he would have allowed petitioner to do so. Resp. Ex. G at 16, 31-32.

Counsel further testified that throughout the course of the trial, he and petitioner discussed the matter of petitioner testifying, with counsel's advice remaining the same. Counsel testified that he knew petitioner wanted to testify, but that petitioner never insisted on doing so. On the last day of trial, they discussed if petitioner would testify, and the decision was reached that petitioner would not do so. *Id.* at 21. Before he rested the case for the defense, counsel told petitioner he was preparing to do so, and petitioner did not voice any objection or indicate that counsel should not rest because petitioner wished to testify. After counsel rested and before the verdict, petitioner did not express any anger in not being permitted to testify. *Id.* at 18, 21-22, 70-72. Counsel stated that the guilty verdict was a surprise to everyone involved with the case. *Id.* at 40-41. After the verdict was rendered, counsel discussed possible appeals and errors with petitioner and told him there was an issue related to petitioner's not testifying because he, the judge, and/or the prosecutor had forgotten to make a record of the decision not to testify by inquiry of petitioner. *Id.* at 42-46.

With regard to his failure to strike Ms. Brown from the venirepanel, counsel testified that petitioner participated in the jury selection process, and that counsel's notes from voir dire did not indicate a decision to strike Ms. Brown. Counsel testified that it was his practice to indicate with a question mark, an "X," or the words, "no" or "cause," anyone he or his client was considering striking, and no such notation appeared by Ms. Brown's name, nor was her name on his preliminary list of challenges. *Id.* at 26-28. Counsel testified that Ms. Brown had said things both favorable and unfavorable to petitioner, and that his

use of strikes in this case was an exercise of trial strategy. *Id.* at 25, 29.

When shown petitioner's voir dire notes, which had two "X"s and a star by Ms. Brown's name, counsel testified that he had no recollection of petitioner ever showing him the "X"s in his notes. Counsel did not remember any disagreement with petitioner about Ms. Brown, but testified that if there had been a disagreement, petitioner would have likely deferred to counsel's advice on the matter. *Id.* at 58-59, 63. Counsel testified that Ms. Brown's statement that she might have some trouble rendering a verdict in a circumstantial case, and that she would like more than one witness in such a case, would cut in favor of petitioner, though the latter statement could be read to involve burden-shifting. He agreed that other statements she made, including her possible bias due to prior grand jury service, would cut against him *Id.* at 48, 61-62.

Decision Denying Post-conviction Relief

The motion court denied petitioner's motion for post-conviction relief on all claims. The court first rejected those claims of ineffective assistance of counsel on which an evidentiary hearing had been denied, concluding that petitioner failed to "plead or prove" legally-sufficient prejudice in connection with those claims, i.e., that a reasonable probability existed that but for counsel's unprofessional errors the result of the proceeding would have been different.

In addition, the court found no support in the record for the claims that the prosecutor insinuated that petitioner's family was involved in organized crime, implied personal knowledge of Ms. Weinstein's truthfulness and of

Mr. Claggett's knowledge about the crimes, or made repeated references to the fact that Mr. McLaughlin made a statement to Ms. Weinstein at the Lassen house after the shooting. *Id.* at 232-33.

The court next rejected the claims that counsel was ineffective for failing to procure and present witnesses to testify that Ms. Weinstein was extremely intoxicated at the time of the shooting and had been in a dating relationship with Mr. Losing. The court based this decision on petitioner's failure to allege "what specifically these witnesses would have testified to," and how their absence affected the outcome of the trial, adding that the failure to call impeachment witnesses did not warrant post-conviction relief. *Id.* at 236-37. The Court similarly rejected the remainder of petitioner's claims of ineffective assistance of counsel on which a hearing was denied. The court held that petitioner's claims of prosecutorial misconduct should have been raised on direct appeal and were not cognizable in a post-conviction proceeding. *Id.* at 240-41.

The court then considered the two claims which were the subject of the evidentiary hearing. The court concluded that Ms. Brown's statement during voir dire that she would have difficulty convicting a defendant on the basis of a single witness's circumstantial evidence afforded "ample reason for a strategic determination by trial counsel not to remove her from the jury." *Id.* at 242-43. The court also concluded that the failure to call petitioner to take the stand was a matter of reasonable trial strategy in light of all the risks involved, that trial counsel discussed this strategy with petitioner, and that petitioner did not voice opposition until after he was found guilty. *Id.* at 243-45.

Affirmance of Denial of Post-conviction Relief

On appeal from the denial of post-conviction relief, petitioner raised all the claims noted above as included in his amended motion, with the exception of the claim of prosecutorial misconduct in permitting Ms. Weinstein to testify that she did not see a second car, i.e., Mr. Claggett's, leave the scene of the crimes. Resp. Ex. H.

The Missouri Court of Appeals affirmed the trial court's decision in all respects. The Court first held that the record supported the motion court's conclusion that the failure to strike Ms. Brown was a matter of reasonable trial strategy. Resp. Ex. J at 4. The appellate court next held that it was not clearly erroneous for the motion court to have credited counsel's testimony that had petitioner insisted on testifying, counsel would have allowed him to do so. *Id.* at 5-6.

The Court next addressed the motion court's denial of an evidentiary hearing on petitioner's remaining claims. The Court agreed with the motion court that petitioner failed to plead and show that there was a reasonable probability that but for counsel's alleged errors and the prosecutor's alleged misconduct, the result of the trial would have been different. *Id.* at 7-10. Lastly, the Missouri Court of Appeals held that the motion court did not clearly err in rejecting petitioner's claims of ineffective assistance of trial and appellate counsel regarding the prosecutor's cross-examination of Mr. Beck and eliciting Ms. Weinstein's testimony that petitioner was just pretending to be friends with Mr. Schuh. *Id.* at 11. Petitioner then filed this action for federal habeas relief, raising the claims listed above.

II. Federal Habeas Petition

Procedural Default

Under the doctrine of procedural default, a federal habeas court will not review a claim that a habeas petitioner did not properly present to the state courts, unless petitioner establishes cause for not properly presenting the claim to the state courts and prejudice or manifest injustice resulting from the federal court's failure to review the claim. *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000) (citing *Coleman v. Thompson,* 501 U.S. 722, 732 (1991)).

The State argues that petitioner's claims 1 (biased juror) and 2 (right to testify) were procedurally defaulted in state court because of petitioner's failure to pursue them in an application for transfer to the Missouri Supreme Court under Missouri Supreme Court Rule 83. The State further argues that petitioner's ineffective assistance of counsel claims 3, 4, and 9, and prosecutorial misconduct claims 5 and 6 were all procedurally defaulted in state court because petitioner failed to plead sufficient facts to support these claims.

These procedural default arguments are misplaced. With respect to claims 1 and 2, the Eighth Circuit Court of Appeals has held in *Randolph v. Kemna,* 276 F.3d 401 (8th Cir. 2002), that the failure of a Missouri prisoner to seek transfer of a claim to the Missouri Supreme Court does not constitute a procedural default. The remaining claims which the State challenges as defaulted were all raised by petitioner in his direct appeal or motion for post-conviction relief. The motion court reviewed these claims, concluding that they were without merit, petitioner raised them on appeal from the denial of post-conviction relief, and the

state appellate court affirmed the lower court on each of these claims. The fact that the state courts believed these claims could be resolved without an evidentiary hearing does not mean that the courts rejected the claims on *procedural* grounds. In accordance with this Court's order of February 14, 2003, the State has addressed the merits of these claims, as the Court will now proceed to do. The Court will consider the States' procedural default argument with respect to claim 11 separately below.

Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a claim has been adjudicated on the merits in state court, an application for a writ of habeas corpus cannot be granted unless the state court adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

The "contrary to" clause is satisfied if a state court has arrived "'at a conclusion opposite to that reached by [the Supreme Court] on a question of law'" or "'confronts facts that are materially indistinguishable from a relevant Supreme Court precedent'" but arrives at the opposite result. *Price v. Vincent,* 123 S. Ct. 1848, 1853 (2003) (quoting *Williams v. Taylor,* 529 U.S. 362, 405 (2000)). A

state court "unreasonably applies" clearly established federal law when it "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413; *Linehan v. Milczark,* 315 F.3d 920, 924 (8th Cir. 2003).

A case cannot be overturned merely because it incorrectly applies federal law, for the application must also be "unreasonable." *Id.* at 411; *Colvin v. Taylor,* 324 F.3d 583, 587 (8th Cir. 2003) (under AEDPA, a writ of habeas corpus may not be granted "unless the relevant state court decision is *both* wrong *and* unreasonable").

> The factual findings of the state court also may be challenged in a § 2254 petition, but they are subject to an even more deferential review. Relief may be granted if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Factual findings by the state court "shall be presumed to be correct," a presumption that will be rebutted only by "clear and convincing evidence." *Id.* § 2254(e)(1).

Kinder v. Bowersox, 272 F.3d 532, 538 (8th Cir. 2001). The summary nature of the state appellate court opinion on direct appeal does not affect the standard of review. *See James v. Bowersox,* 187 F.3d 866, 869 (8th Cir. 1999), *cert. denied,* 528 U.S. 1143 (2000).

Ineffective Assistance of Counsel

The majority of petitioner's claims assert that his constitutional right to the effective assistance of counsel

was denied. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that "counsel's representation fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 689. When a claim involves appellate counsel, a habeas petitioner must show that "there is a reasonable probability that the result of the direct appeal would have been different if the argument had been made." *Carter v. Bowersox,* 265 F.3d 705, 713-714 (8th Cir. 2001) (quoted case omitted).

Strategic choices of trial counsel "'made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith,* 123 S.Ct. 2527, 2530-01 (2003) (quoting *Strickland,* 466 U.S. at 690-91). "A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689.

Under AEDPA, this court must give substantial deference to the state court's analysis of the evidence in considering an ineffective assistance of counsel claim, and "the fact that evidence exists that might lead [this court] to a different conclusion is not sufficient to conclude that the [Missouri] court's application of the *Strickland* attorney-performance standard was objectively unreasonable." *Hoon v. Iowa,* 313 F.3d 1058, 1062 (8th Cir. 2002).

Trial Counsel's Failure to Strike Venireperson Brown (claim 1)

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961) (quoted case omitted). If a single juror is improperly influenced, a verdict is as unfair as if all jurors were improperly influenced. *United States v. Delaney,* 732 F.2d 639, 643 (8th Cir. 1984). For a habeas petitioner to "maintain a claim that a biased juror prejudiced him, however, he must show that the juror was actually biased against him." *Mack v. Caspari,* 92 F.3d 637, 642 (8th Cir. 1996) (en banc), *cert. denied,* 520 U.S. 1109 (1997).

This Court concludes that petitioner is not entitled to habeas relief based on trial counsel's failure to strike Ms. Brown from the jury. The state post-conviction motion court found that while Ms. Brown's prior grand jury experience might have been unfavorable to petitioner, several other statements she made might be considered favorable to petitioner. As noted above, the court found that her statements provided "ample reason for a strategic determination by trial counsel not to remove her from the jury." Resp. Ex. G. at 242-43. The state court was entitled to credit defense counsel's testimony that it was not due to an oversight that Ms. Brown was seated as a juror. Counsel was apparently satisfied with Ms. Brown's voir dire response as a whole, and it was not unreasonable for the state courts to conclude that counsel was not ineffective on this matter. *See Kinder,* 272 F.3d at 553 (state courts' determination that counsel in a rape case was not ineffective for failing to strike for cause a venireperson who stated during voir dire that her niece had been abducted and molested and that she would be unable to forget that

during jury deliberations was not an unreasonable application of *Strickland*); *Mack*, 92 F.3d at 642 (petitioner convicted of armed criminal action failed to show actual juror bias where venireperson, who indicated that a friend's daughter had been beaten to death five years before, and that the killer was on death row, was asked whether this had "any effect on you now in how you see people who are just even charged with crimes?" and responded, "I don't know. I couldn't really say for sure."); *Isom v. Lockhart*, 847 F.2d 484, 486 (8th Cir. 1988) (no ineffective assistance when counsel did not use peremptory challenge to exclude venireperson who disagreed with a defendant's decision not to testify but concluded that he could set aside his personal beliefs).

Trial Counsel's Failure to Honor Petitioner's Right to Testify (claim 2)

The United States Supreme Court has explicitly recognized the constitutional right of a criminal defendant to testify on his own behalf, *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987), and that the defendant has the "ultimate authority" to decide whether to so testify, *Jones v. Barnes*, 463 U.S. 745, 751 (1983). However, this "'fundamental choice over which the defendant has the ultimate decision can be knowingly and voluntarily waived if, by his or her silence, the defendant apparently acquiesces to the waiver.'" *Whitfield v. Bowersox*, 324 F.3d 1009, 1013-14 (8th Cir. 2003) (quoting *United States v. Washington*, 198 F.3d 721, 724 (8th Cir. 1999)). Whether counsel advised the defendant about his right to testify and whether the defendant accepted the recommendation not to testify are findings of fact. *Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir. 1998).

A voluntary and knowing waiver of the right to testify may exist where the defendant remained silent after counsel rested. *Whitfield,* 324 F.3d at 1013. A defendant must exercise his right to testify by affirmative action at the appropriate time, or else a knowing and voluntary waiver of the right is deemed to have occurred. *United States v. Blum,* 65 F.3d 1436, 1444 (8th Cir. 1995) (defendant waived her right to testify where she chose not to testify, and then, after the close of evidence, sent a note to the court stating she had changed her mind). "The defendant may not . . . indicate at trial his apparent acquiescence in his counsel's advice that he not testify, and then later claim that his will to testify was 'overcome.'" *United States v. Bernloehr,* 833 F.2d 749, 752 (8th Cir. 1987) (finding waiver where petitioner made no objection when his counsel rested without calling him).

Here, the Court cannot say that the state courts' adjudication of this matter resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The state post-conviction court found trial counsel's testimony to be "very credible," and found that petitioner was aware of the trial strategy and of the fact that trial counsel was preparing to rest, but did not voice any opposition until after he was found guilty. A review of the record as a whole supports the finding that trial counsel discussed with petitioner the advisability of petitioner testifying, and that petitioner acquiesced in counsel's advise that he not testify. *See Whitfield,* 324 F.3d at 1016 (petitioner's guilt-phase waiver of right to testify and his silence at conclusion of evidence

during penalty phase support state court's finding of waiver of right to testify during penalty phase).

To the extent petitioner is claiming that the advice not to testify constituted ineffective assistance of counsel, the Court funds this claim unavailing as well. The state courts' assessment of the risks associated with petitioner testifying is supported by the record. Given these risks, it cannot be said that advising petitioner not to testify was unprofessional. *See Isom v. Lockhart,* 847 F.2d at 486 (8th Cir. 1988) (no ineffective assistance of counsel when defendant did not testify on his behalf where there was conflicting testimony on whether defendant asked to testify on his behalf, and the prosecutor might well have successfully impeached him).

Trial Counsel's Failure to Locate and Call Certain Witnesses (claim 3)

Petitioner asserts counsel was ineffective for failing to locate and call witnesses who would have testified that Ms. Weinstein was extremely intoxicated at the time of the events to which she testified, had dated Mr. Schuh's brother, and had psychiatric problems. As noted above, the state post-conviction court denied petitioner's request for a hearing on this claim. This Court is troubled by the apparent basis for this denial – petitioner's asserted failure to plead and show that but for counsel's alleged errors, the outcome of the trial would have been different.

The Court discerns no pleading deficiency in plaintiff's presentation of his *Strickland* claims in the motion for post-conviction relief. More importantly, the evidence of guilt in this case cannot be characterized as overwhelming, and depended upon the credibility of Ms. Weinstein. It

is not clear to the Court that there is no reasonable probability that the result of the trial would have been different had all the evidence petitioner claims was available to call into question Ms. Weinstein's credibility been presented to the jury.

Nevertheless, upon review of the record, the Court concludes that trial counsel's performance did not fall below an objective standard of reasonableness. Trial counsel, an experienced criminal defense lawyer, met with petitioner prior to trial numerous times, worked with an investigator to prepare for trial (Resp. Ex. A at 616), succeeded in excluding some evidence that was potentially very damaging, developed and followed a reasonable trial strategy of trying to establish inconsistencies in Ms. Weinstein's timeline of events surrounding the crimes, successfully objected to several inappropriate questions by the prosecutor, reasonably cross-examined Ms. Weinstein, and delivered a sound closing argument, during which he specifically called the jury's attention to Ms. Weinstein being drunk on the night in question.

Significantly, petitioner does not now allege that he told trial counsel that Ms. Weinstein had more than four beers during the timeframe in question or was more drunk than one might infer from the facts that were in evidence. Nor does he allege that he advised counsel that Ms. Weinstein had been romantically involved with Mr. Losing or had psychiatric problems. *See Owens v. Dormire,* 198 F.3d 679, 682 (8th Cir. 1999) (where habeas petitioner did not present clear and convincing evidence that he informed counsel of the existence and availability of a potential witness, state court's decision that counsel's

failure to call the witness was not ineffective assistance did not misapply *Strickland*), *cert. denied,* 530 U.S. 1265 (2000).

The Eighth Circuit has "cautioned against judging [counsel's performance] with too much hindsight. Lawyers are not perfect, and the Constitution does not guarantee a perfect trial." *Jones v. Delo,* 258 F.3d 893, 902 (8th Cir. 2001) (en banc); *see also Whitfield,* 324 F.3d at 1018 (although not perfect, counsel's performance was not constitutionally deficient). In sum, the Court cannot say that counsel's failure to locate and call witnesses, who allegedly would have testified as petitioner claims they would have, constituted substandard performance.

Because the Court concludes that petitioner makes an insufficient showing that his trial counsel's performance was inadequate, the prejudice prong of the *Strickland* test need not be decided. *See Whitehead v. Dormire,* 2003 WL 21939670, at *4 (8th Cir. Aug. 14, 2003) (*Strickland* requires a showing of both deficient performance and prejudice; "a court deciding an ineffective assistance claim need not address both components of the inquiry if the defendant makes an insufficient showing on one"); *Clark v. Groose*, 16 F.3d 960, 964 (8th Cir.), *cert. denied*, 513 U.S. 834 (1994) (prejudice from counsel's omissions need not be addressed because performance was not substandard).

Remaining Claims of Ineffective Assistance of Counsel (claims 4 and 9)

Petitioner raises four additional claims of ineffective assistance of counsel on which the state post-conviction court denied his request for an evidentiary hearing. (1) He faults counsel for failing to present evidence that

petitioner was his handicapped father's caretaker, thereby refuting the prosecutor's argument that petitioner stopped at his father's house before the murder to get a gun, rather than to check up on his father. (2) He asserts that counsel should have presented evidence that petitioner did not try to hide from the police during the six weeks following Mr. Schuh's murder, but rather lived openly in the community. (3) He claims that trial counsel was ineffective for failing to preserve for appellate review, and appellate counsel was ineffective for failing to raise on appeal, the argument that petitioner was deprived of a fair trial due to the Ms. Weinstein's testimony that she felt petitioner was pretending to be friends with Mr. Schuh at the NCYA party before the murder. (4) Petitioner also claims that appellate counsel was ineffective for failing to raise on appeal the matter of the prosecutor's impeachment of Mr. Beck with unsubstantiated prior convictions.

The Court concludes that the Missouri courts' assessment that these failings did not constitute ineffective assistance of counsel was not an unreasonable application of *Strickland*. Evidence of petitioner's role as caretaker for his father was before the jury. As noted above, petitioner's father testified that petitioner lived with him and took care of him, and that petitioner would stop by to check on him when petitioner went out. Petitioner's father also testified that petitioner did so on the night of Mr. Schuh's murder. The Court believes that the impact of other witnesses testifying that petitioner took care of his father would have been minimal. Thus, the state courts did not misapply *Strickland* in determining that counsel's failure to corroborate this testimony did not constitute ineffective assistance. *See Hall v. Luebbers*, 296 F.3d 685, 693 (8th Cir. 2002) (no ineffective assistance where impact of

testimony of witness not called would have been cumulative and minimal); *James v. Bowersox*, 187 F.3d 866, 871 (8th Cir. 1999) (same), *cert. denied*, 528 U.S. 1143 (2000).

The Court reaches the same conclusion with regard to the state courts' rejection of petitioner's argument that trial counsel was ineffective for failing to locate and call witnesses who would have testified that petitioner lived openly in the community during the six weeks between the Mr. Schuh's murder and petitioner's surrender to the police. Counsel elicited from petitioner's father that petitioner was asleep in his room when the police came to the house on August 16, 1998, and that petitioner's father did not turn petitioner in to the police earlier upon the advice of counsel. Trail [sic] counsel called petitioner's fiancee who testified that she visited petitioner almost daily at his house during this time frame, and in closing argument, counsel directly refitted the prosecutor's argument regarding petitioner's "flight."

Petitioner's next argument of ineffective assistance of counsel, both trial and appellate, concerns Ms. Weinstein's testimony that she felt petitioner was pretending to be friends with Mr. Schuh before the murder. Petitioner argues that this testimony was improper conjecture and should not have been admitted into evidence. "A state court's evidentiary rulings can form the basis of relief under the due process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *see also Bounds v. Belo*, 151 F.3d, 1116, 1119 (8th Cir. 1998). The Court discerns no constitutional error in the state court's admission of this evidence, and hence, in counsel's failure to object to it at trial or on appeal. Petitioner had

the opportunity to cross-exam Ms. Weinstein on her perceptions, and to argue to urge the jury not to rely on them.

Thus, as to these three claims of ineffective assistance of trial counsel, the Court concludes that there is no reasonable probability the jury would have reached a different verdict had counsel presented the evidence petitioner now argues should have been presented. *See Lamar v. Graves*, 326 F.3d 983 (8th Cir. 2003) (basing determination of no prejudice from counsel's failure to present certain evidence on consideration of each piece of evidence separately); *Hall*, 296 F.3d at 692 (habeas petitioner alleging an ineffective assistance of counsel claim cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test).

The last claim of ineffective assistance of counsel concerns only appellate counsel. Petitioner faults appellate counsel for not arguing on direct appeal that the prosecutor's attempt to impeach Mr. Beck with unsubstantiated prior convictions deprived petitioner of a fair trial. There is nothing in the record to suggest that the prosecutor's conduct on this matter involved anything more than a mistake, and the jury was aware that the convictions in question were not shown to be Mr. Beck's. The Court concludes that the state courts properly rejected this claim, as there is no reasonable probability that the result of petitioner's direct appeal would have been different had this issue been raised.

Trial Court's Exclusion of Evidence of Mr. Bonnard's Murder (claim 8)

Two principles of clearly established federal law are relevant to petitioner's claim based on the exclusion of evidence pertaining to Mr. Bonnard's murder. First, the due process clause guarantees a criminal defendant "a fair opportunity to defend against the State's accusations," which includes the right to present his own witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Newman v. Hopkins* 192 F.3d 1132, 1135 (8th Cir. 1999). Second, as noted above, a state court's evidentiary ruling can form the basis for federal habeas relief under the due process clause only when it was "so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process." *Estelle*, 502 U.S. at 68. Rulings on the exclusion of evidence in state trials "rarely rise to the level of a federal constitutional violation. Only the exclusion of critical, *reliable* and highly probative evidence will violate due process." *Nebinger v. Ault*, 208 F.3d 695, 697 (8th Cir. 2000).

Here, the Court cannot say that the trial court's decision to exclude evidence of Mr. Bonnard's murder resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner presented no evidence directly connecting Mr. Bonnard's murder to this case,[5] and no evidence

[5] The only connection between the two incidents appears to be based on petitioner's assertion that Mr. Schuh was waiting to buy drugs that night, that earlier Mr. Schuh possibly made a phone call to the "drug" house where Mr. Bonnard was murdered, and that Mr. Bonnard's murder was allegedly related to a failure to pay for drugs. Interestingly, however, the Court notes that defense counsel testified that petitioner never told him that Mr. Schuh was waiting outside to

(Continued on following page)

suggesting that the perpetrator of that crime committed the crimes for which petitioner was convicted. Any such connection would be based on pure speculation and could have thrown the trial into a mini-trial related to Mr. Bonnard's murder. Moreover, the record indicates that Mr. Bonnard was killed with a .380 semi-automatic, Resp. Exh. B at 48, whereas Mr. Schuh was killed by a .38 or .357 caliber revolver. In sum, the excluded evidence does not meet the standard for establishing a due process violation. *See id.* (exclusion of evidence regarding violent past actions of murder defendant's non-testifying companion, whom defendant claimed had committed the murder, did not violate due process); *cf. Chambers v. Mississippi*, 410 U.S. at 302-03 (where third person on separate occasions orally confessed to the murder with which defendant was charged to three different friends, under circumstances which bore substantial assurances of trustworthiness, and where such person made, but later repudiated, a written confession, exclusion of the testimony of the persons to whom the oral confessions were made, under hearsay rule, coupled with State's refusal to permit defendant to cross-examine the third person, deprived defendant of a fair trial in violation of the due process clause).

Sufficiency of the Evidence (claim 10)

The due process clause prohibits the conviction of an accused "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A writ

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buy drugs, and the state post-conviction motion court found defense counsel's testimony to be very credible.

of habeas corpus based on a claim of insufficiency of the evidence will be granted only if, upon reviewing the evidence in the light most favorable to the prosecution, it is found that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *see also McDonald v. Bowersox* 101 F.3d 588, 599 (8th Cir. 1996) (en banc).

For purposes of a habeas challenge to the sufficiency of the evidence, state law defines the elements of state law crimes. *Flieger v. Delo*, 16 F.3d 878, 883 (8th Cir. 1994). A conviction for first-degree murder under Missouri law requires a finding that the defendant "knowingly cause[d] the death of another person after deliberation upon the matter." Mo. Rev. Stat. § 565.020. "Deliberation" is defined as "cool reflection for any length of time no matter how brief" *Id.* § 565.020 (3). The Missouri Code provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action." *Id.* § 571.015.1.

Here, the jury was entitled to believe Ms. Weinstein's testimony that placed petitioner at the scene of the shooting immediately before and immediately after Mr. Schuh's murder. Her description of the relative positions of the two men was consistent with the forensic evidence. There was no evidence that anyone else was present at the precise time and place of the crimes. The State's evidence, when viewed in the light most favorable to the prosecution, while not overwhelming, was sufficient to enable a rational trier of fact to find the essential elements of the charged crimes beyond a reasonable doubt. *See Bounds*, 151 F.3d at 1118 (evidence was sufficient to support guilty verdicts of first-degree murder and armed criminal action

under Missouri law, although no one witnessed the actual shooting and the weapon was not recovered, where witness placed petitioner at the scene of the murder shortly before hearing shots; there was evidence that petitioner had threatened the victim; shortly after the murder, petitioner's paramour was in possession of a weapon of the same general type as that used in the shooting; and there was no evidence that anyone besides petitioner was present at the scene of the crimes).

Prosecutorial Misconduct – failure to disclose that Ms. Weinstein had seen a second car leaving the scene of the crime (claim 11)

On June 10, 2002, petitioner sought leave to amend his habeas petition by adding a claim that his due process rights were violated by the prosecutor withholding material exculpatory evidence. The motion was supported by the unsigned affidavit[6] of the prosecutor, attesting that when he interviewed Ms. Weinstein prior to the grand jury proceedings in this case, she told him that she saw a second car leaving the scene of the crime, and he told Ms. Weinstein not to volunteer that information to defense counsel if she were not asked about it. The prosecutor attests that he was concerned that the presence of the second vehicle, which he presumed was Mr. Claggett's, might raise the inference that a person other than petitioner had an equal opportunity to commit the crime. The affidavit further asserts that defense counsel did not ask

[6] On October 16, 2003, this Court granted petitioner leave to substitute a signed affidavit.

Ms. Weinstein about a second car when he interviewed her in the prosecutor's office prior to trial or at trial.

The record establishes that in May 1997 the prosecutor left the prosecutor's office and took a job with the same law firm as counsel who represented petitioner on direct appeal and in the state post-conviction proceedings. The record includes respondent's motion, dated February 5, 1998, to disqualify petitioner's counsel due to this circumstance (Resp. Ex. F at 22), and an order from the state motion court, dated September 21, 1998, denying this motion. The order stated that the motion was denied "on the ground that the court has dismissed all counts of movant's petition wherein [the former prosecutor] could not be screened from participation in this matter. The court's order is conditioned upon petitioner waiving any claims of conflict he may raise against his attorneys." Resp. Ex. F at 75.

Petitioner's federal habeas counsel argues that he discovered the factual basis for claim 11 fortuitously (on March 21, 2002) while discussing other aspects of Mr. Callanan's case with the former prosecutor. Thus, habeas counsel argues, this new claim was timely under 28 U.S.C. § 2254(d)(1)(D), because it was filed within one year of the "date on which the factual predicate for the claim . . . could have been discovered through the exercise of due diligence," as that section allows.

Respondent argues that this claim is (1) time barred by the one-year statute of limitations of § 2254(d)(1); (2) procedurally defaulted; and (3) without merit. In support of the first two arguments, respondent argues that petitioner knew about this claim when he filed his amended post-conviction motion in state court, which included the

following claim of prosecutorial misconduct, as quoted above:

> Counsel for the state permitted Ms. Weinstein to testify falsely during cross examination that she had observed only Mr. Callahan's truck and no other vehicle departing from the scene of the homicide, despite her purported presence within view of the scene at the time that Mr. Claggett drove his automobile away and necessarily encountered her and despite counsel's knowledge that Ms. Weinstein had observed Mr. Claggett's automobile departing from the premises.

Resp. Ex. F at 34. This claim was not raised on direct appeal or on appeal from the denial of post-conviction relief, thereby giving rise, according to respondent, to a procedural bar. *See Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (Missouri inmate procedurally defaulted claims not raised on direct appeal and/or on appeal from the denial of post-conviction relief), *cert. denied*, 523 U.S. 1010 (1998).

Respondent further argues that due diligence by petitioner's post-conviction counsel would have revealed the precise claim asserted as claim 11. Counsel should have withdrawn from the case if he believed the state court's order denying respondent's motion to disqualify counsel precluded counsel from asking the former prosecutor about Ms. Weinstein's testimony.

Petitioner counters that the claim raised in the amended post-conviction motion was different than claim 11 of his federal habeas petition, in that the former claimed that the prosecutor "knew or should have known that Ms. Weinstein was testifying falsely"; whereas the latter claims that the prosecutor deliberately told her to

withhold the truth and failed to correct her false testimony when it came into the record. Supp. Traverse at 6-7. This claim, petitioner argues, is not time or procedurally barred.

The Court agrees with petitioner that the precise claim raised now is not barred by the statute of limitations or by procedural default. Because the state courts did not adjudicate this claim, this Court applies the more liberal pre-AEDPA standard of review. *See Brown v. Luebbers*, 2003 WL 22150720, at *11 (8th Cir. Sept. 19, 2003). Under this standard, petitioner must demonstrate a "reasonable probability that the error complained of affected the outcome of the trial." *Robinson v. Crist*, 278 F.3d 862, 866 (8th Cir. 2002).

A defendant's constitutional right to due process is violated if the prosecution withholds material evidence favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This rule applies to impeachment evidence, as well as to exculpatory evidence. *Giglio v. United States*, 405, U.S. 150, 154-55 (1972). In this context, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The same materiality standard applies to the prohibition of *Napue v. Illinois*, 360 US. 264, 269-70 (1959), against a prosecutor allowing false testimony to go uncorrected. *Dye v. Stender*, 208 F.3d 662, 667 (8th Cir. 2000).

The Court in no way condones the former prosecutor's conduct on this matter. Clearly, the statement in his affidavit that defense counsel did not ask Ms. Weinstein about a second car during trial is a misrepresentation.

Furthermore, the prosecutor specifically noted during opening argument that Ms. Weinstein would testify that she did not see another car leave the scene of the crimes, and the prosecutor himself elicited such testimony.

Nevertheless, the Court does not believe that petitioner has shown sufficient prejudice from the prosecutor's actions to warrant habeas relief. Ms. Weinstein's testimony at trial that she did not see another vehicle leave the scene did not deprive petitioner of a fair trial. The jury had before it the testimony of Mr. Claggett that he left the Lassen house in his vehicle shortly after the shooting and saw a car turning on the Bent Twig Lane as he was leaving. The testimony of two neighbors was consistent with this. This was not a contested issue. Indeed, during closing argument, the prosecutor noted that Mr. Claggett drove off immediately after the shooting. Ms. Weinstein's testimony that she did not see a second car would have tended to undermine her credibility with the jury as to what happened on the evening in question, not bolster it.

Similarly, the Court discerns no significant prejudice to petitioner from not knowing that Ms. Weinstein told the prosecutor she saw a second car. Defense counsel knew Ms. Weinstein's testimony at trial on this matter was not truthful, even without the knowledge that she had told the prosecutor that she saw a second vehicle leave the scene, and defense counsel cross-examined Ms. Weinstein on this basis. Accordingly, the Court believes this claim must be denied on the merits. *See id.* (denying *Brady/Bagley/Napue* claim where materiality standard was not met).

Remaining Claims of Prosecutorial Misconduct (claims 5, 6, and 7)

Petitioner also argues that he is entitled to habeas relief because the prosecutor improperly (a) permitted witness intimidation by Mr. Schuh's half brother; (b) failed to disclose Mr. Boelhauf's prior conviction; and (c) improperly suggested to the jury, through questions of witnesses and comments during closing argument, that he was aware of evidence of petitioner's guilt that was not before the jury, that petitioner's family was involved in organized crime, and that witnesses were afraid of petitioner and his family.

As a general rule, improper comments by a prosecutor do not merit federal habeas relief unless they

> infected the trial with enough unfairness to render a petitioner's conviction a denial of due process. To amount to a due process violation, improper remarks by a prosecutor must be so egregious that they fatally infect the proceedings and render a defendant's entire trial fundamentally unfair. A petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial – i.e., that absent the alleged impropriety the verdict probably would have been different.

Stringer v. Hedgepeth, 280 F.3d 826, 829 (8th Cir. 2002) (internal quotations omitted).

With regard to closing argument specifically, the Supreme Court has ruled that in order to be a constitutional violation, a statement by a prosecutor must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*,

477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). The Supreme Court listed several factors to consider in determining whether a misstatement by a prosecutor was so egregious that it required a new trial as a matter of constitutional law: (1) whether the prosecutor's statement manipulated or misstated the evidence; (2) whether the remarks implicated specific rights of the accused such as the right to counsel or the right to remain silent; (3) whether the defense invited the comment; (4) instructions given by the trial court; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut the statement. *Id.* at 181-82.

Upon review of the record, this Court takes issue with the state motion court's finding that there was no support in the record for the claim that the prosecutor implied personal knowledge of petitioner's guilt, or that petitioner's family was connected to criminal activity. Nevertheless, the Court concludes that petitioner cannot establish that the outcome of the trial probably would have been different but for the prosecutor's misconduct. The exchange between the prosecutor and Mr. Claggett as to whether Mr. Claggett was afraid of petitioner and his family was stricken from the record, as was the question posed to Mr. Callanan regarding his contact with Sorkis Webbe. The inference during closing argument that Mr. Claggett knew petitioner was the perpetrator, but was afraid to say so, was not objected to, and in any event, did not rise to the level of a constitutional violation. *See Mack*, 92 F.3d at 643 (prosecutor's references in closing argument to defendant charged with armed criminal action as "killer," and prosecutor's reference to his own certainty of defendant's potential dangerousness, though improper, did

not warrant habeas corpus relief; defendant failed to show that, absent alleged impropriety, verdict probably would have been different).

Cases in which the Eighth Circuit found that prosecutorial misconduct in closing argument violated a defendant's due process rights involved conduct more egregious than that involved here. *See, e.g., Copeland v. Washington*, 232 F.3d 969, 972-75 (8th Cir. 2000) (where evidence for death penalty against defendant sentenced to death for murder as her husband's accomplice was weak, state court's determination that prosecutor's comments during penalty phase comparing defendant to violent drug gangs and stating "there has never, ever been a more complete and utter disregard for the sanctity of human life as this case," did not constitute due process violation was unreasonable application of federal law); *Newlon v. Armontrout*, 885 F.2d 1328, 1335-38 (8th Cir. 1989) (same as to comments expressing prosecutor's personal belief in the propriety of the death sentence, implying he had special knowledge outside the record, linking petitioner with several well-known mass murderers, and asking the jurors to "kill him now. Kill him now."), *cert. denied*, 497 U.S. 1038 (1990).

With regard to the prosecutor's failure to disclose Mr. Boelhoefs prior conviction, the Court also concludes that the state courts' rejection of this claim was not contrary to, nor the result of, an unreasonable application of clearly established federal law. *See U.S. v. Jones*, 34 F.3d 596 (8th Cir. 1994) (en banc) (prosecution's failure to disclose to defendant prior to trial all of government witness's state convictions, which defendant claimed could have been used to impeach witness, did not violate *Brady* and deny defendant due process; when information is readily

available to defendant, it is not *Brady* material and prosecution does not violate *Brady* by not discovering and disclosing information), *cert. denied*, 514 U.S. 1067 (1995); *see also U.S. v. Varnedore*, 2003 WL 21922577, at *6 (10th Cir. Aug. 13, 2003) (no *Brady* violation where there was not a reasonable probability that the result of the trial would have been different had prior conviction of government's witness been admitted into evidence).

The only witness identified by petitioner as having been subject to intimidation by Mr. Losing is Mr. Claggett. Petitioner nowhere suggests what Mr. Claggett's testimony would have been absent the alleged intimidation, or how this testimony would have been favorable to petitioner. In connection with this claim, the Court takes judicial notice of the fact that on February 16, 1999, the Missouri Court of Appeals affirmed Mr. McLaughlin's conviction of tampering with a witness, namely, Ms. Weinstein, on petitioner's behalf in connection with this case. *Missouri v. McLaughlin*, 988 S.W. 2d 542 (Mo. Ct. App. 1999).

III. Petitioner's Request for an Evidentiary Hearing

Petitioner argues that he is entitled to an evidentiary hearing to present the following evidence: (1) Kara Weinstein would testify that she was instructed by the prosecutor to withhold information about a second car she saw fleeing the scene of the shooting; (2) three witnesses would testify that they observed Ms. Weinstein consuming far more alcohol on the night in question than she admitted at trial; (3) William Losing's sister-in-law would testify about Ms. Weinstein's relationship with Mr. Losing

and about Mr. Losing's attempts to influence and intimidate witnesses in the case; (4) the prosecutor would testify in accordance with his affidavit submitted by petitioner in support of claim 11; and (5) Mr. Claggett would testify that when he was interviewed in a witness room during trial, he was accompanied by Mr. Losing who threatened and intimidated him, and that at some point the prosecutor came to Mr. Claggett's house and attempted to make him change his statement to the police. Title 28 U.S.C. § 2254(e)(2) provides that if a habeas petitioner

> failed to develop the factual basis for a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the petitioner shows that . . . the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfmder would have found the [petitioner], guilty of the underlying offense.

Even if a hearing is not precluded by § 2254(e) because the petitioner pursued development of his claims in state court but was denied the opportunity to do so, the federal court may deny petitioner an evidentiary hearing if such a hearing would not assist in the resolution of his claims. In other words, "even if the facts petitioner seeks to prove are true, if those facts would not entitle him to relief (that is, if those facts would not show that the Missouri Supreme Court acted contrary to or unreasonably applied clearly established federal law)," an evidentiary hearing is not required. *Johnston v. Luebbers*, 288 F.3d 1048, 1059 (8th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 983 (2003); *see also Toney v. Gammon*, 79 F.3d 693,

697 (8th Cir. 1996) (habeas petitioner is not entitled to an evidentiary hearing in federal court on claims on which he did not receive an evidentiary hearing in his state post-conviction proceedings, where record indicates that his claims are either barred from review or without merit).

The Court has considered the testimony petitioner maintains he would present at an evidentiary hearing and concludes that he is not entitled to such a hearing. The Court believes that all the claims on which petitioner seeks to expand the record can be resolved, as set forth above, without an evidentiary hearing.

IV. Conclusion

Petitioner is not entitled to an evidentiary hearing before this Court on any of the claims raised in his federal habeas petition and is not entitled to habeas relief under 28 U.S.C. § 2254. The Court believes that a Certificate of Appealability should issue on whether petitioner is entitled to an evidentiary hearing on claim 3 (trial counsel was ineffective for failing to impeach Ms. Weinstein with evidence that she was extremely intoxicated at the time of the events to which she testified, had been romantically involved with Mr. Schuh's half brother, and had psychiatric problems). The Court believes that "reasonable jurists" might find the Court's assessment of this matter "debatable or wrong." *See Miller-El v. Cockrell*, 123 S.Ct. 1029, 1040 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court does not believe the same can be said as to the remaining claims.

Accordingly,

IT IS HEREBY RECOMMENDED that petitioner's request for an evidentiary hearing be denied.

IT IS FURTHER RECOMMENDED that the petition of Lawrence Callanan for habeas corpus relief be is **DENIED**.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability should issue on whether petitioner is entitled to an evidentiary hearing before this Court on claim 3 of his habeas petition.

IT IS FURTHER RECOMMENDED that a Certificate of Appealability should be denied on all other claims.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained, and that the failure to file timely objections may result in a waiver of the right to appeal questions of fact.

/s/ Audrey Fleissig
AUDREY FLEISSIG
UNITED STATES
MAGISTRATE JUDGE

Dated October 23, 2003.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LAWRENCE T. CALLANAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 4:01CV326 DJS**
	)	
AL LUEBBERS,	)	
	)	
Respondent.	)	

ORDER

On March 3, 2004, the Court denied Lawrence Callanan's petition for writ of habeas corpus. Now pending before the Court is petitioner's application for certificate of appealability. In order to grant a certificate of appealability, the Court must find that "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further procedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). After careful consideration, the Court is not persuaded that petitioner has made a substantial showing of the denial of a constitutional right. Accordingly,

IT IS HEREBY ORDERED that petitioner's application for certificate of appealability [Doc. #37] is denied.

Dated this 26th day of April, 2004.

/s/ Donald J. Stohr
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LAWRENCE T. CALLANAN	)	Case No. 4:01CV326 DJS
Petitioner	)	(AGF)
	)	
vs.	)	
	)	
AL LUEBBERS,	)	
	)	
Respondent.	)	

ORDER

(Filed Feb. 14, 2003)

Lawrence Callanan has filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. This petition was referred to the undersigned United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b). Presently before the Court is petitioner's motion for an evidentiary hearing and to expand the record. (Docket #17). Respondent opposes this motion.

Background

On April 4, 1996, a jury in the Circuit Court of St. Louis County found petitioner guilty of murder in the first degree and armed criminal action, related to the shooting of John Schuh in 1995. The trial court sentenced petitioner to life imprisonment without parole and a concurrent sentence of thirty years. Thereafter, petitioner filed a direct appeal, which was denied. *See State v. Callanan,* 948 S.W.2d 678 (Mo. Ct. App. 1997).

Petitioner then filed a timely Rule 29.15 post-conviction motion with the Circuit Court claiming, among other things, that he had ineffective assistance of trial

counsel. An evidentiary hearing was held on two of respondent's claims (grounds 1 and 2 in this petition). Following the hearing, the Circuit Court denied petitioner's motion, which was affirmed by the Missouri Court of Appeals on April 25, 2000.

After exhausting state court remedies, petitioner filed a petition seeking federal *habeas corpus* relief pursuant to 28 U.S.C. §2254. In his petition, petitioner has raised eleven grounds for relief:

(1) He had ineffective assistance of trial counsel, in that his attorney failed [to] challenge a juror who admitted that she was prejudiced against petitioner and favored the state.

(2) He had ineffective assistance of trial counsel, in that his attorney rested the defense's case knowing that petitioner wanted to testify and the attorney did not give petitioner an opportunity to knowingly, voluntarily, and intelligently relinquish his right to testify.

(3) He had ineffective assistance of trial counsel, in that his attorney failed to impeach and refute the testimony of the state's key witness, Kara Weinstein, with evidence that she was extremely intoxicated that night of the murder, that she was romantically involved with the victim's brother, and that she was mentally unstable.

(4) He had ineffective assistance of trial counsel, in that his attorney failed to investigate and present evidence to corroborate petitioner's alibi and to counter misleading inferences of guilt drawn from petitioner's behavior before and after the shooting.

(5) Prosecutorial misconduct in that the prosecutor failed to disclose the prior convictions of the State's witness, Chris Boelhauf.

(6) Prosecutorial misconduct, in that the State allowed the victim's brother to intimidate or influence witnesses during the prosecutor's pretrial interview and in the witness room during trial.

(7) The prosecutor repeatedly committed misconduct during the trial by referring to numerous prejudicial and incompetent matters outside the scope of the evidence.

(8) The trial court erred in excluding evidence identifying other persons as possible perpetrators of the crime for which petitioner was convicted.

(9) He had ineffective assistance of trial counsel and appellate counsel, in that his attorneys failed to preserve at trial and then brief on appeal the error that occurred when the prosecutor cross-examined defense witness Lawrence Beck about convictions which he did not have, and when the prosecutor improperly elicited opinion testimony from Kara Weinstein.

(10) The evidence was insufficient to support a finding that petitioner was guilty of first degree murder or armed criminal action in that (a) the evidence supported two equally valid inferences with respect to the identity of the murderer, and only one was consistent with petitioner's guilt; and (b) there was no evidence from which the jury could have found or inferred the element of deliberation.

(11) Prosecutorial misconduct in that the State failed to disclose that Kara Weinstein saw a second car fleeing the scene of the crime, and the prosecutor failed to correct her false testimony at trial.

Petitioner's Motion

At this time, petitioner moves for an evidentiary hearing and to expand the record. (Docket #17). Petitioner proposes that there be testimony from the following witnesses: Kara Weinstein, who would testify to information that relates to grounds 3, 5, 6, 7, 9, and 11; Stephanie Schenk, Richard Healy and Lisa Schaeffer, who would testify to information that relates to ground 3; Thomas Burke, a police officer, who would testify to information that relates to ground 4; Harriett Ojile, Patricia Beck, and Letitia Callanan, petitioner's mother and aunts, who would testify to information that relates to ground 4; Chris Boelhauf, who would testify to information that relates to ground 5; Ronnie Claggett and Timothy Harper, both trial witnesses, who would testify to information that relates to ground 6; and Dan Diemer,[1] the former assistant prosecutor, who would testify to information that relates to grounds 1, 2, 3, 4, 5, 6, 7, 9, and 11. In his motion for an evidentiary hearing and to expand the record, petitioner does not proffer that there would be testimony or evidence presented that would relate to grounds 8 and 10.

---

[1] Petitioner writes in his motion for an evidentiary hearing and to expand the record that Dan Diemer's affidavit "is submitted herewith." The Court notes that no affidavit was attached to petitioner's motion for an evidentiary hearing and to expand the record. An affidavit by Dan Diemer, which was not notarized, was attached to petitioner's motion to amend his petition. (Docket #15).

Respondent has opposed the motion for an evidentiary hearing and to expand the record. Respondent argues that petitioner had an evidentiary hearing in state court on grounds 1 and 2, and that the necessary facts are in the record for the Court to address the issues raised in grounds 1 and 2, as well as ground 7. Respondent further argues that an evidentiary hearing is not warranted for grounds 3, 4, 5, 6, 7, and 9, as these grounds were procedurally defaulted, and therefore they are not properly before this Court. Respondent did not respond to petitioner's request to present evidence relating to the issues raised in ground 11.

Petitioner filed his federal habeas petitioner [sic] after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), and therefore the provisions of the act apply to this case. *Williams v. Taylor,* 529 U.S. 420, 429 (2000). Under the AEDPA, the district court *shall not* hold an evidentiary hearing on a habeas claim, "if the applicant has failed to develop the factual basis of a claim in State court proceedings . . . " 28 U.S.C. § 2254(e)(2). Interpreting this statute, the Supreme Court has held that a petitioner cannot be said to have failed to develop the factual basis of a claim, unless there is a "lack of diligence or some greater fault, attributable to the [petitioner] or [his] counsel." *Williams,* 529 U.S. at 432. Here, there was a evidentiary hearing in the state court for grounds 1 and 2, and the petitioner attempted to develop the factual basis of these two claims. With the exception of ground 11, petitioner moved for an evidentiary hearing in state court on the other grounds, which was denied. In regard to ground 11, petitioner claims the basis of this claim is founded on newly discovered information. The Court finds there is no evidence that the petitioner failed to develop his claims,

within the meaning of *Williams,* and therefore, the AEDPA's bar on an evidentiary hearing is inapplicable.

Where a petitioner has not failed to develop a claim in state court, the determination of whether an evidentiary hearing is warranted is governed by pre-AEDPA standards. In *Townsend v. Sain,* 372 U.S. 293 (1963), the Supreme Court articulated six circumstances under which a federal court's exercise of its power to grant an evidentiary hearing would be mandatory: (1) where the merits of a factual dispute were not resolved in the state hearing; (2) where the state factual determination is not fairly supported by the record; (3) where the fact-finding procedure employed by the state court was not adequate to afford petitioner a full and fair hearing; (4) where there is a substantial allegation of newly discovered evidence; (5) where the material facts were not adequately developed at the state-court hearing; or (6) where for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. *Id.* at 313. In cases where an evidentiary hearing is not required, a district court retains the discretionary power to hold a hearing if the court deems one necessary. *Id.* at 318 (in every case the district court has the power, "constrained only by [its] sound discretion," to hold an evidentiary hearing on a constitutional claim); *Clemmons v. Delo,* 124 F.3d 944, 952 (8th Cir. 1997) (district court has the discretionary power to hold an evidentiary hearing).

The Court finds that factual questions relating to the issues in grounds 1, 2, 7, and 11 can be resolved on the current record. Nothing in the record before the Court indicates that an evidentiary hearing is appropriate on these four grounds, as none of the six factors of *Townsend* are implicated. There was a state evidentiary hearing that

adequately addressed the factual issues in grounds 1 and 2, and having reviewed the transcript of the hearing and the deposition testimony of petitioner, the Court finds that the issues raised [sic] these two claims can be decided on the record. *See Toney v. Gammon,* 79 F.3d 693, 697 (8th Cir. 1996) (district court need not hold an evidentiary hearing where there was a state evidentiary hearing and the issue can be decided on the record before the court); *Blalock v. Lockhart,* 898 F.2d 1367, 1370 (8th Cir. 1990) (same). In regard to grounds 7 and 11, the Court finds that the issues involved in these grounds for relief can also be decided based on the trial transcript and other documents in the record. *Id.*

In regard to grounds 3, 4, 5, 6, and 9, respondent argues that an evidentiary hearing is not warranted because the grounds are procedurally barred, and a petitioner is not entitled to an evidentiary hearing where that petitioner's claims are procedurally barred. *Wilson* [*v.*] *Kemna*, 12 F.3d 145, 146 (8th Cir. 1994). The Court reviewed respondent's memorandum in response to the order to show cause. In support of its argument that grounds 3, 4, 5, 6, and 9 are procedurally barred, the respondent asserts that the Missouri Court of Appeals refused to address these five issues because they were not sufficiently pled in petitioner's Rule 29.15 motion. Respondent argues that insufficient pleading constitutes a procedural bar, which precludes federal review.

The Court notes that respondent only devoted one paragraph to these five claims, and it did not address the merits of the claims. Having examined the record and the memoranda of the parties, the Court finds that a briefing on the merits would be beneficial to the Court. Respondent will be given time to provide the Court with a supplemental brief to the response to the order to show cause. In this

brief, respondent should also address why an evidentiary hearing would not be necessary for the Court to decide grounds 3, 4, 5, 6, and 9 on their merits.

At this time, the Court will deny, without prejudice, petitioner's motion for an evidentiary hearing on grounds 3, 4, 5, 6, and 9. Upon receipt of respondent's supplemental brief, the Court may allow petitioner to revisit the issue of an evidentiary hearing for grounds 3, 4, 5, 6, and 9.

Accordingly,

IT IS HEREBY ORDERED that petitioner's motion for an evidentiary hearing and to expand the record is **denied** in regard to grounds 1, 2, 7, and 11. (Docket #17). Petitioner's motion for an evidentiary hearing and to expand the record in regard to grounds 3, 4, 5, 6, and 9 is **denied, without prejudice**. (Docket #17). Petitioner has not requested an evidentiary hearing to address the issues on grounds 8 and 10.

IT IS FURTHER ORDERED that on or before **Monday, March 17, 2003**, respondent shall file with this Court a supplemental brief addressing, on the merits, the issues raised by petitioner in grounds 3, 4, 5, 6, and 9. Respondent shall also address why an evidentiary hearing would not [sic] necessary for the Court to decide grounds 3, 4, 5, 6, and 9 on the merits of these claims.

/s/ Audrey G. Fleissig
AUDREY G FLEISSIG
United States Magistrate Judge

Dated this 14th day of February, 2003.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2044

Lawrence T. Callanan,	*	
	*	
Appellant,	*	
v.	*	No. 4:01CV326 DJS
	*	
Al Luebbers,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

December 13, 2004

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

AFFIDAVIT

Comes now Affiant, Dan Diemer, and first being duly sworn, states and declares as follows:

I am an attorney licensed to practice law in the State of Missouri. My office is presently located in Clayton, Missouri. From October 31, 1988 to May 20, 1997, I served as an Assistant Prosecuting Attorney in St. Louis County, Missouri. In that capacity, I was assigned to prosecute Larry Callanan for first degree murder in the shooting of John Schuh.

I was assigned the case sometime prior to Larry's arrest. I can't say precisely when, but the police were telling my office that Larry seemed to be avoiding arrest. I cannot attest to what efforts the police made to locate and apprehend Mr. Callanan. I understand that eventually a police officer named Ted Burk made arrangements to surrender Larry.

I remember that Larry had engaged the Law Office of Don Wolf to represent him at trial. There was one point prior to trial when it appeared that Paul D'Agrosa might end up being the attorney on the case. I believed it would be to my advantage to try the case against Paul D'Agrosa rather than Don Wolf, so I stayed home from a prosecutor's seminar that was being held at the Lake of the Ozarks so that I would be prepared to try the case for the state against Paul D'Agrosa, rather than risk a continuance to try it against Don Wolf.

Our case against Larry was entirely circumstantial and depended very heavily on the testimony of Kara Weinstein. My impression of Ms. Weinstein was that she was immature and somewhat flighty.

I remember preparing Ms. Weinstein to testify prior to the grand jury proceedings in this case. When I interviewed her, she mentioned something about seeing another car leave the scene of the crime around the same time she saw Larry Callanan leave the scene in his truck. In my mind, I thought the car she described could have belonged to Ronnie Claggett. Although I did not tell Ms. Weinstein to lie or withhold information, I told her simply to answer the questions that were asked, and not to volunteer any information about the second car unless she was specifically asked to do so.

Paul D'Agrosa interviewed Ms. Weinstein in my office prior to trial. We arranged to do it this way because Mr. D'Agrosa did not have adequate time to notice up a deposition prior to the trial. Mr. D'Agrosa did not ask Ms. Weinstein about a second car either during this interview or at the trial of the case. I assume that had Mr. D'Agrosa asked such a question, Ms. Weinstein would have repeated what she had told me earlier about the other car. My case depended heavily on the element of time, distance and speed to demonstrate Larry Callanan's presence at the scene of the crime and exclusive opportunity to have been the shooter. I was concerned that the presence of the second vehicle in that time frame might raise the inference that another person was also present and had equal opportunity to commit the crime. That is why I had asked Ms. Weinstein not to volunteer that information prior to the grand jury proceeding. She also did not volunteer that information to Mr. D'Agrosa, nor did she do so at the time of trial.

I prosecuted this case vigorously and aggressively. I told Larry Callanan's father, Tom Callanan, that I did not have any personal animosity toward him or his son. I pride

myself in being an aggressive trial attorney, both as a prosecutor and presently as a criminal defense attorney.

I had contact with Bill & Russell Losing, the half-brothers of Johnny Schuh, throughout my preparation for trial. They were also present in the courtroom through much of the trial. Some of my interviews with witnesses prior to trial, including Tim Harper, Bill Losing was present.

Although I was extremely aggressive in the prosecution of the case, the defense was not as aggressive. I was concerned about the purely circumstantial evidence in the case and selected the jury with a view toward preparing them for a circumstantial evidence case. No one was more surprised that I was when the jury came back after an hour and a half with a conviction of first degree murder. My office was prepared to make a plea offer of twenty years but no plea negotiations were pursued by Mr. Wolf's office. I had prepared Johnny Schuh's family to expect a verdict of acquittal or second degree murder.

/s/ [Illegible]
Daniel E. Diemer, Affiant

U.S. District Court

Eastern District of Missouri (LIVE)

Notice of Electronic Filing

The following transaction was received from AGF, entered on 10/16/2003 at 9:51 AM CDT and filed on 10/16/2003

Case Name: Callanan v. Luebbers
Case Number: 4:01-cv-326
Filer:
Document Number:

Docket Text:
Docket Text ORDER re [34] MOTION to Supplement filed by Lawrence T. Callanan; ORDERED GRANTED, noting that the proposed affidavit is nearly identical to the unsigned affidavit previously filed by the petitioner . . . Signed by Judge Audrey G. Fleissig on October 16, 2003. (AGF,)

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(2)

Supreme Court, U.S.
FILED
JUN 31 2005
OFFICE OF THE CLERK

No. 04-1526

IN THE
SUPREME COURT OF THE UNITED STATES

LAWRENCE CALLANAN,
Petitioner,

v.

AL LUEBBERS, Superintendent,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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Table of Contents

Table of Contents i

Table of Authorities ii

Statement of Facts iv

Argument 1

I. Petitioner's claims for relief all look to the standard for granting a certificate of appealability 1

II. Petitioner's claim of prosecutorial misconduct 2

A. This claim is procedurally barred 2

B. Petitioner's claim would fail on its merits . 4

III. Petitioner's claim that counsel was ineffective for not calling petitioner as a witness 5

IV. Evaluating petitioner's claims *de novo* instead of under AEDPA would not change the result of this case 7

Conclusion 10

Table of Authorities

Cases

Anderson v. Groose, 106 F.3d 242 (8th Cir. 1997), *cert. denied* 521 U.S. 1108 (1997) 3

Coleman v. Thompson, 501 U.S. 722 (1991) 3

Darden v. Wainwright, 477 U.S. 168 (1986) 7

Donnelly v. DeCristoforo, 416 U.S. 637 (1974) 7

Marshall v. Lonberger, 459 U.S. 422 (1983) 6

Miller-El v. Cockrell, 537 U.S. 322 (2003) 1

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 3

Slack v. McDaniel, 529 U.S. 473 (2000) 1

State v. Dunson, 979 S.W.2d 237 (Mo.App. W.D. 1998) 8

State v. Johnson, 484 S.W.2d 491 (Mo. 1972) 8

State v. Williams, 849 S.W.2d 575 (Mo.App. E.D. 1993) 8

Strickland v. Washington, 466 U.S. 668 (1984) 5, 8, 9

Strickler v. Greene, 527 U.S. 263 (1999) 4

Sweet v. Delo, 125 F.3d 1144 (8th Cir. 1997), *cert. denied* 523 U.S. 1010 (1998) 3

Tennard v. Dretke, 124 S.Ct. 2562 (2004) 1

United States v. Bagley, 473 U.S. 667 (1985) 4, 7

Rules of Court

Federal Rule of Evidence 608(b) 9

Statement of Facts

Petitioner Lawrence Callanan is currently serving a life sentence without the possibility of probation or parole on one count of murder in the first degree and a concurrent thirty-year sentence on one count of armed criminal action. Petitioner shot John Schuh four times, once in the head and three times in the abdomen, after a night of teenage parties in and around St. Louis, Missouri, on July 2, 1995. The State produced evidence that Callanan was alone with Schuh immediately prior to the murder, had an angry altercation with the victim earlier in the evening, and left the scene of the crime immediately after the murder. The state's case was based heavily on the testimony of Kara Weinstein, who was with petitioner much of the evening of the murder and dropped him off at the scene of the crime immediately prior to the murder.

Callanan was convicted after a jury trial in the Circuit Court of St. Louis County and the Missouri Court of Appeals upheld the conviction on direct appeal, *State v. Callanan*, 948 S.W.2d 678 (Mo.App. E.D. 1997). After Callanan's post-conviction relief motion was denied in the trial court, the Missouri Court of Appeals affirmed the denial of post-conviction relief. *Callanan v. State*, 19 S.W.3d 150 (Mo. App. E.D. 2000).

Callanan next filed for federal habeas relief in the United States District Court for the Eastern District of Missouri. The case was referred to Magistrate Judge Audrey G. Flessig, who recommended that the petition be denied. Pet. App. at 27. District Judge Donald Stohr concurred in Judge Flessig's conclusion and denied the petition and also denied a certificate of appealability on all of the claims in the petition. Pet. App. at 2. The United States Court of Appeals for the Eighth Circuit also denied a certificate of appealability on all of petitioner Callanan's claims. Pet. App. at 1. This petition for writ of certiorari followed.

Argument

I. Petitioner's claims for relief all look to the standard for granting a certificate of appealability

Petitioner's three substantive claims for review are based on constitutional claims in a federal habeas petition upon which the district court and the Court of Appeals denied a certificate of appealability. Pet. App. at 1, 77. Therefore, the only ground for relief properly before this Court is whether the court below erred in denying a certificate of appealability, the subject that petitioner's fourth claim.

This Court has already addressed the standard for granting a certificate of appealability. This Court held:

> A COA should issue if the applicant has "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which we have interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S., at 484, 120 S.Ct. 1595; see also *Miller-El v. Cockrell,* 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Tennard v. Dretke, 124 S.Ct. 2562, 2569 (2004). The law regarding the standard for issuing a certificate of appealability is well-settled in this Court's jurisprudence. No conflict between the circuits exists on this question. This Court's discretionary review is not necessary to reiterate well-established law that this Court restated less than one year ago. Further, as respondent will show, all of petitioner's claims are meritless and the Eighth Circuit properly denied a certificate of appealability.

II. Petitioner's claim of prosecutorial misconduct

Petitioner contends in issue one of his petition that Dan Diemer, the prosecutor in this case, encouraged State's witness Kara Weinstein not to volunteer information unless she was specifically asked to do so and allowed Ms. Weinstein to present false testimony to the jury. Petitioner does not suggest that the opinions below rejecting his claim are in conflict with the rulings of any other courts of appeal or highest state courts; he merely asserts that the district court erred in applying this Court's precedent.

This claim does not merit issuance of a writ of certiorari for two reasons.

A. This claim is procedurally barred

Petitioner Callanan raised this claim in his amended post-conviction motion:

> counsel for the state permitted Ms. Weinstein to testify falsely during cross-examination that she had observed only Mr. Callanan's truck and no other vehicle departing from the scene of the homicide, despite her purported presence within view of the scene at the time that Mr. Claggett drove his automobile away and necessarily encountered her and despite counsel's knowledge that Ms. Weinstein had observed Mr. Claggett's automobile departing from the premises.

Resp. Ex. F[1] at 34. However, Callanan chose not to raise this claim on appeal to the Missouri Court of Appeals. This

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[1]All references to respondent's exhibits refer to the exhibits filed in the district court.

Court has held that in order to avoid a procedural default, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1(1999). Petitioner chose not to invoke a complete round of Missouri's appellate process. *See Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997), *cert. denied* 523 U.S. 1010 (1998)(claims raised in a post-conviction motion but not raised on appeal are defaulted); *Anderson v. Groose*, 106 F.3d 242, 245 (8th Cir. 1997), *cert. denied* 521 U.S. 1108 (1997)(same). Petitioner therefore defaulted on this claim.

Further, petitioner alleged in his amended post-conviction motion that the prosecutor did not object to perjured testimony. Resp. Ex. F at 34. This statement necessarily implies that the prosecutor had prior knowledge of the allegedly false testimony and that petitioner Callanan knew at the time he filed his post-conviction motion that the prosecutor knew that Weinstein's testimony was false. Petitioner therefore could have alleged his claim that the prosecutor failed to disclose impeachment evidence in his post-conviction motion. As petitioner chose not to raise this claim in his post-conviction motion, he has defaulted on this claim.

Petitioner cannot overcome his default because he cannot show cause and prejudice or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, review of this claim is procedurally barred. This Court need not grant a writ of certiorari to examine the merits of a procedurally defaulted claim.

B. Petitioner's claim would fail on its merits

Petitioner claims that the misconduct occurred when the

prosecution failed to disclose impeachment evidence for Kara Weinstein under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This Court has ruled that the factors for determining a *Bagley* violation are that: 1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; 2) the evidence must have been suppressed by the state, either willfully or inadvertently; and 3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. This legal standard is not new law, and petitioner's only contention is that the court below misapplied it.

Petitioner's claim would fail because the evidence in this case was not material and prejudicial in that a reasonable probability does not exist the results of the proceeding would not have changed if the disclosure had been made. Petitioner's argument is based on the fact that Ms. Weinstein testified that she saw only one car left the scene of the murder was crucial to the State's case and that two cars actually left immediately following the murder. However, evidence that Ronnie Claggett left the scene in his car very soon after the murders was admitted at trial. Claggett himself testified that he left the scene "a couple minutes" after the murder. Trial Tr. at 355. Timothy Harper testified that Claggett drove off in his car just after the murder. *Id.* at 385-86. Earl Tippett, a neighbor, testified that a dark red or burgundy Camero left the murder scene just after the shots.[2] *Id.* at 430. The evidence therefore was before the jury that Claggett had left the scene of the party just after the murder. Trial counsel

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[2]Ronnie Claggett was driving a "purple Camero." Resp. Ex. A at 358.

argued that fact extensively to the jury in closing argument. *Id.* at 697. In fact, trial counsel argued to the jury that based on Earl Tippett's testimony, Kara Weinstein must have been lying. *Id.* Because this evidence and this argument was already before the jury, there is no reasonable probability that the result of the trial would have changed if the prosecution had disclosed Weinstein's comment. Petitioner thus has failed to show prejudice. As this case is merely a garden-variety application of *Bagley*, this Court should deny a writ of certiorari on this claim.

III. Petitioner's claim that counsel was ineffective for not calling petitioner as a witness

Petitioner contends in his second issue that counsel was ineffective for denying petitioner the opportunity to testify at trial. Petitioner cites no conflict between the court's decision below and the decisions of any other court; he merely states that the lower court erred in its determination. Certiorari is not necessary to decide this type of commonplace ineffective assistance claim under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a standard petitioner does not mention or acknowledge with respect to this claim.

In any case, petitioner's claim would be meritless. Petitioner's trial counsel testified in the post-conviction relief evidentiary hearing that

> Did [petitioner] say, Don't rest the case, I am going to testify? No. Did I discuss with him, whether it be right there at counsel table or prior to that morning or afternoon whether or not he was going to testify? Yes, we discussed it. And the decision was reached that we were done, that we didn't need his testimony, or did we want his testimony.
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>
> If [petitioner] had insisted that he was going to take

> the stand in spite of any advice I may have given him, then he would have taken the stand. And that is my habit and practice as an attorney ... Would I not have prevented [petitioner testifying] over his vehement wishes, no.

PCR Tr. 17, 71. The post-conviction court found counsel "very credible," PCR L.F. 245, a finding entitled to deference by this Court, *Marshall v. Lonberger*, 459 U.S. 422, 434-35, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983)("Title 28 U. S. C. §2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"). The record thus demonstrates that counsel and petitioner reached an agreement that petitioner would not testify, and that counsel would have allowed petitioner to testify if petitioner had insisted on doing so. Counsel did not prevent petitioner from testifying. This claim simply has no merit and certiorari should be denied on this claim.

IV. Evaluating petitioner's claims *de novo* instead of under AEDPA would not change the result of this case

Petitioner contends in his third issue that the district court used the wrong standard of review in denying his claims of ineffective assistance of counsel and prosecutorial misconduct. Petitioner's argument, basically put, is that the district court improperly construed the state court's determination of procedural bar as a decision on the merits and deferred to that resolution under AEDPA.

With regard to the prosecutorial misconduct claims, petitioner's argument lacks any merit. The district court stated for its standard of review the unremarkable proposition that "prosecutorial misconduct does not merit federal habeas relief unless the misconduct infected the trial with enough

unfairness to render a petitioner's conviction a denial of due process." Pet. App. at 19. This standard requiring petitioner to show prejudice echoes this Court's opinions in *Donnelly v. DeCristoforo*, 416 U.S. 637, 642-43, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and *Darden v. Wainwright*, 477 U.S. 168, 180-82, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), which establish the due process requirements, including prejudice, for prosecutorial misstatements in closing argument, and *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999), and *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), which establish the due process requirements, including prejudice, for the prosecutor's suppression of exculpatory and impeaching evidence. The district court applied this correct standard to petitioner's claims of prosecutorial misconduct. Pet. App. at 20-21. A writ of certiorari is not required on this point.

With regard to the ineffective assistance of counsel claims, the result would not have changed even if these claims were reviewed *de novo* under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This conclusion flows naturally from the fact that while the magistrate judge decided the claims directly under *Strickland*, Pet. App. at 56-58, the district court gave deference to the state court's determinations under AEDPA, Pet. App. at 14-16, and both courts denied relief.

On the merits, petitioner claims that counsel was ineffective for failing to investigate and present evidence that State's witness Kara Weinstein was intoxicated on the night of the crime, that she was romantically involved with the shooting victim's half-brother, that she had mental problems, and other unspecified impeaching evidence. Pet. Br. at 23.

This claim fails regardless of the deference offered the State court's adjudication. Missouri law is clear that "upon cross-examination on collateral matters for the purpose of impeachment, the party is bound by the answer of the

witness." *State v. Johnson*, 484 S.W.2d 491, 496 (Mo. 1972). Further, no extrinsic evidence is admissible on a collateral matter simply to impeach a witness. *State v. Dunson*, 979 S.W.2d 237, 242 (Mo.App. W.D. 1998). Evidence is not collateral "if the alleged discrepancy involves a crucial issue directly in controversy or relates to 'any part of the witness' account of the background and circumstances of a material transaction, which as a matter of human experience, he would have been mistaken about if his story were true.'" *Id.*, *quoting State v. Williams*, 849 S.W.2d 575, 578 (Mo.App. E.D. 1993). Therefore, under Missouri law, extrinsic evidence may be introduced to impeach a witness' testimony only when the alleged discrepancy relates to the facts in controversy, i.e. the elements of the charged offense, or to the facts and circumstances of the charged crime.[3]

Trial counsel specifically questioned Kara Weinstein about whether she had been influenced by the victim's family to change her story, and she stated "no." Trial Tr. at 291. Trial counsel also specifically inquired about whether Ms. Weinstein was drunk on the night of the crime. Trial Tr. at 311-315. Under Missouri law and federal law, trial counsel could not have asked anything more concerning Ms. Weinstein's intoxication or her relationship with the victim's family and would have been precluded from introducing extrinsic evidence of those events because the events concerned were collateral in that Ms. Weinstein's intoxication and relationships do not have any bearing on the elements of the crime of murder for which petitioner was facing trial. Likewise, with respect to Ms. Weinstein's alleged mental problems, trial counsel could not have put on independent collateral testimony to impeach Ms. Weinstein under Missouri law.

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[3]Federal law is similar in nature. *See* Federal Rule of Evidence 608(b).

Trial counsel cannot be ineffective for failing to investigate or attempt to introduce evidence that is inadmissible under Missouri law because the result of the trial would not have changed based on investigation and attempted presentation of inadmissible evidence. *Strickland v. Washington*, 466 U.S. at 696.

The district court and the magistrate determined that these claims were devoid of merit under AEDPA and under *de novo* review. The courts were correct. Petitioner's claim is devoid of merit, and this Court should deny the petition for writ of certiorari on this point.

Conclusion

For the foregoing reasons, the respondent prays that the Court enter its order denying the petition for writ of certiorari.

Respectfully submitted,

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